Mississippi Law Journal

Mississippi Edition:
Dedicated to Legal Issues in the State of Mississippi

ARTICLES

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THE DEATH PENALTY: ETHICS AND ECONOMICS IN MISSISSIPPI

*Valena Elizabeth Beety**

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INTRODUCTION

Five of the original nine Supreme Court Justices who reinstated the death penalty in the United States after it had been abolished four years prior—a majority—vocally opposed the death

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penalty in all circumstances by the time they left the bench.[1] Two of the three Justices who wrote the primary opinion in *Gregg v. Georgia*—the pivotal case reinstating the death penalty—came to the conclusion later in their careers that the decision was wrong.[2] One should note that in both instances the Justices' change in perspective happened as they were in the twilight of their careers, although whether the change was occasioned by the wisdom of decades of experience or the removal of political pressure is impossible to say.

Now, legislative policies surrounding the death penalty may be on the verge of a similar shift due to an essential political reality: the economy. At the beginning of the financial crisis in 2007, New Jersey had spent $253 million over a twenty-five-year period on costs associated with the death penalty—a time period during which the State executed not a single prisoner.[3] That same year, New Jersey became the first state in forty years to legislatively repeal the death penalty.[4] In March 2009, New Mexico Governor Bill Richardson, a proponent of the death

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[1] *See generally* Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees: *A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010). Of the Justices who took part in the *Gregg v. Georgia*, 428 U.S. 153 (1976), decision, the following supported the reinstatement of the death penalty: Justices Stewart, Powell, and Stevens (judgment of the Court); Justices White and Rehnquist, and Chief Justice Burger (concurrence); Justice Blackmun (concurrence). Justices Brennan and Marshall dissented. Of these Justices, Justices Brennan, Marshall, Powell, Stevens, and Blackmun all opposed the death penalty by the end of their lives.

[2] *See* Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring))); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994) ("I have come to think that capital punishment should be abolished. . . . [because it] serves no useful purpose." (quoting Justice Lewis F. Powell, Jr.)).

[3] Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on our Nation's "Evolving Standards of Decency,"* 15 MICH. J. RACE & L. 223, 249 n.19 (2009).

[4] *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Apr. 11, 2012).

penalty, signed a bill to eliminate the death penalty in his state.[5] Governor Pat Quinn of Illinois signed into law a bill abolishing the death penalty in March 2011, making Illinois the sixteenth state without the death penalty.[6] A central concern for these politicians and legislatures was the large, and largely unjustifiable, cost of the death penalty in the face of massive statewide budget cuts.[7]

Those costs are likewise apparent in Mississippi, a state that houses fifty-three people on death row, and has executed eighteen people since the death penalty was reinstated in 1977.[8] Between 1989 and 2002, no individuals were executed in Mississippi, although the State continued to provide high-security separate housing for the death row inmates, incurring additional costs.[9] More recently, three men were executed in Mississippi in 2010; two men were executed in 2011—with a third scheduled and deferred; and three men were executed in the spring of 2012.[10]

Even in Mississippi, the death penalty is finding new opponents in the midst of a difficult economy. In 2011, House Bill 127 was introduced in the Mississippi legislature to place a

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[5] Elaine de Leon, *Money, Morality, and Repealing the Death Penalty*, RELIGION & ETHICS NEWSWEEKLY (Apr. 24, 2009), http://www.pbs.org/wnet/religionandethics/epis-odes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/.

[6] Ray Long, *Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life*, CHI. TRIB. (Mar. 9, 2011, 11:59 AM), http://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html.

[7] *See, e.g.*, Tom Kacich, *Death Penalty in Quinn's Hands*, NEWS-GAZETTE (Jan. 12, 2011, 9:00 AM), http://www.news-gazette.com/news/courts-police-and-fire/2011-01-12/death-penalty-quinns-hands.html (quoting Sen. Dan Duffy, R-Lake Barrington: "We have spent over $100 million of taxpayer money defending and prosecuting death row cases. The death penalty does not make our society safer, I believe. It has been an ineffective and expensive use of our scarce resources."); Mary Massingale, *House Narrowly Approves Abolition of Death Penalty*, ILL. STATEHOUSE NEWS (Jan. 6, 2011), http://illinois.statehousenewsonline.com/4846/house-narrowly-approves-abolition-of-death-penalty (quoting Rep. Pat Verschoore, D-Milan: "I was on both sides of this issue. But then you think of the potential cost savings of this bill, and the state needs all of the savings we can get . . . .").

[8] *Death Row General Facts*, MISS. DEP'T OF CORRS., http://www.mdoc.state.ms.us/death_row.htm (last visited Apr. 11, 2012).

[9] *Mississippi and the Death Penalty*, MISS. DEP'T OF CORRS., http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Apr. 11, 2012).

[10] *Id.*

moratorium on the death penalty.[11] Judicially, in a similar vein to Justice Stevens, Mississippi Supreme Court Justice Oliver Diaz voiced an eloquent opposition to the death penalty in all cases before leaving the bench in 2008.[12] One can see why cost is becoming more and more of a consideration; facing revenue shortfalls even more dire than much of the country, Mississippi made major budget cuts in 2010 and 2011 and remains the state with the lowest income per capita in the nation.[13] As budget cuts for the state ranged from twelve percent to seventeen percent across the board, the massive cost of the correctional bureaucracy in the state had popular Governor Haley Barbour on the defensive over his last years in office.[14]

When Barbour was directly challenged about using discretionary funds for the Mississippi Department of Corrections (MDOC) instead of other areas, Barbour retorted: "Why am I doing that? So some convict doesn't move next door to your momma."[15] While this type of public safety rhetoric is often used to justify prison spending, the substantial savings the state would receive from eliminating the death penalty would not release a single convict.

The exception, of course, is the recent freeing of an innocent man sentenced to death in Mississippi, which has started a different kind of momentum against the death penalty in the state.[16]

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[11] H.R. 127, 2011 Reg. Sess. (Miss. 2011), *available at* http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0100-0199/HB0127IN.pdf (introduced by Rep. John Mayo).

[12] Doss v. State, No. 2007-CA-00429-SCT, 2008 Miss. LEXIS 608, at *38 (Miss. Dec. 11, 2008) (Diaz, P.J., dissenting) (opinion withdrawn on grant of rehearing Oct. 22, 2009).

[13] *Per Capita Personal Income by State, 1990 to 2011*, U.N.M., BUREAU OF BUS. & ECON. RES., http://bber.unm.edu/econ/us-pci.htm (last visited Apr. 11, 2012); *News Release: GDP by State*, U.S. BUREAU OF ECON. ANALYSIS (June 7, 2011, 8:30 AM), http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm.

[14] Molly Parker, *Early Paroles Possible in Miss. Budget Crunch*, CLARION-LEDGER, Mar. 1, 2010, at A1.

[15] Valena Beety, *The Cost of Death*, JACKSON FREE PRESS (July 14, 2010), http://www.jacksonfreepress.com/index.php/print_view/39077.

[16] Press Release, Innocence Project, Two Innocent Men Cleared Today in Separate Murder Cases in Mississippi, 15 Years After Wrongful Convictions (Feb. 15, 2008), http://www.innocenceproject.org/Content/Two_Innocent_Men_Cleared_Today_in_Separate_Murder_Cases_in_Mississippi_15_Years_after_Wrongful_Convictions.php.

This Article posits that Mississippi's growing willingness to rethink the death penalty in its current financial and penal situation is indicative of changes in the death penalty dialogue nationally, changes that have revived debate about the death penalty on both economic and ethical grounds. Part I reviews the history of the death penalty in Mississippi to provide a basis for comparison with its current status in the state. Part II examines the actions of court justices in ultimately opposing the death penalty, whether these decisions were economically or ethically influenced. Part III examines the political climate surrounding the death penalty and prison growth in general in Mississippi, and how that climate is changing under economic pressures. Part IV addresses the cost of the death penalty, particularly in the face of budgetary constraints. Part V compares Mississippi to other states in similar circumstances.

Lastly, Part VI examines the cases of Paul Woodward and Kennedy Brewer, two men sentenced to death in Mississippi. Paul Woodward was executed in 2010, while Kennedy Brewer was proven innocent and exonerated in 2008. These two cases highlight the indispensability of post-conviction counsel, and the necessary costs of the extensive appeals process in death penalty cases. These Mississippi cases reveal the economic necessity of fully funding counsel and evidence preservation and analysis for capital cases, underscoring how the cost of the death penalty will always intersect with the ethics of the institution.

I. THE DEATH PENALTY IN MISSISSIPPI

Like the rest of the country in the wake of the *Furman v. Georgia* decision, Mississippi suspended the death penalty in 1972.[17] Four years later, the Mississippi Supreme Court held that if capital trials have a bifurcated sentencing proceeding, and incorporate aggravating and mitigating circumstances into the jury's decision as to how the defendant shall be sentenced, then capital cases, and the death penalty, could proceed in Mississippi.[18] The court's opinion was in response to *Gregg v. Georgia*, a Supreme Court case confirming that capital trials could

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[17] Furman v. Georgia, 408 U.S. 238 (1972).

[18] Jackson v. State, 337 So. 2d 1242, 1256 (Miss. 1976).

follow the bifurcated trial standard with guided discretion, creating one trial to determine guilt or innocence and one trial to determine whether to implement the death penalty, such that the trials were fair and constitutional.[19] The Mississippi legislature acted promptly to pass legislation comporting with the court decisions, thus reinstating the death penalty in Mississippi with statutes that remain in effect and fairly unchanged today.[20]

Changes in the death penalty in Mississippi have been primarily due to U.S. Supreme Court cases that require compliance with further protections. For example, after the Court decided that the execution of a mentally handicapped prisoner violates the Eighth Amendment and constitutes cruel and unusual punishment, Mississippi followed by amending its own standards.[21] Mississippi likewise followed suit when the Court banned the death penalty for juvenile offenders in 2005, at a time when Mississippi had five men on death row who had been sentenced as juveniles.[22] Otherwise, the standard of review for death sentences is largely the same now as it was in 1976: "heightened scrutiny," where "all doubts are to be resolved in favor of the accused because what may be harmless error in a case with less at stake becomes reversible error when the penalty is death."[23] The death penalty itself has not been found to be cruel and unusual punishment, nor has the method implemented in Mississippi, death by lethal injection.[24]

II. OPPOSITION TO THE DEATH PENALTY FROM THE BENCH

In 2008, at the age of eighty-eight, Justice John Paul Stevens publicly stated that his decision in *Gregg* had been wrong. In

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[19] Gregg v. Georgia, 428 U.S. 153, 195 (1976); *see also Jackson*, 337 So. 2d at 1256.

[20] *Jackson*, 337 So. 2d at 1256.

[21] Mitchell v. State, 886 So. 2d 704, 712 (Miss. 2004).

[22] *Juvenile Offenders Who Were on Death Row*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/juvenile-offenders-who-were-death-row (last visited Apr. 11, 2012). Ronald Chris Foster's execution was suspended two days before it was scheduled to take place by Governor Ronnie Musgrove who anticipated the U.S. Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). *See* Foster v. State, 848 So. 2d 172, 173 (Miss. 2003) (en banc).

[23] Bennett v. State, 990 So. 2d 155, 158 (Miss. 2008) (internal quotations omitted); Chamberlin v. State, 989 So. 2d 320, 330 (Miss. 2008); Havard v. State, 988 So. 2d 322, 346 (Miss. 2008).

[24] *Bennett*, 990 So. 2d at 161; Branch v. State, 882 So. 2d 36, 80 (Miss. 2004).

simple words, he wrote the death penalty is "[a] penalty with such negligible returns to the State" that it necessarily is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[25]

The three Justices who crafted the plurality opinion supporting the death penalty statute in *Gregg v. Georgia* were Potter Stewart, Lewis E. Powell, and John Paul Stevens.[26] Both Powell and Stevens eventually turned away from the death penalty, in all its forms.[27] Justice Blackmun's later change led to what has been described as a powerful "cumulative effect of Powell, Stevens, and Blackmun's conversions," where "three Justices together formed half of *Furman*'s dissenting block and two-thirds of *Gregg*'s plurality reviving the modern American death penalty as we now know it."[28] Stevens's colleagues on the bench for the *Gregg* decision included Justices Brennan, Marshall, and Blackmun, all of whom renounced the power of the State to execute individuals.[29] Once openly opposed to the death penalty, Justices Brennan, Marshall, and Blackmun[30] then proceeded to dissent from every affirmance, every denial of certiorari, and every denial of a stay of execution in the capital cases brought before them.[31]

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[25] Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

[26] 428 U.S. 153, 154 (1976).

[27] *See generally* Semel, *supra* note 1.

[28] Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 552 (2009).

[29] *See generally* Semel, *supra* note 1.

[30] Justice Blackmun's rejection of the death penalty came in 1994, much later than Brennan and Marshall's, when he famously stated, "From this day forward, I no longer shall tinker with the machinery of death." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). Blackmun's reasoning rested on the lack of meaningful federal oversight, and the inconsistency of the application of the death penalty. *Id.* at 1158-59.

[31] Semel, *supra* note 1, at 792 n.31 ("Justice Marshall began each of his post-*Gregg* capital punishment opinions with the following phrase: 'Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . .'" (quoting Steiker, *supra* note 28, at 526)); *see also* Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan, J., concurring) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . ."). In almost every death penalty decision following *Callins*, Justice Blackmun included the phrase: "Adhering to my view that the death penalty cannot be imposed fairly within the

Yet each of these Justices renounced the death penalty individually, not as a unit, nor as a common voice from the Court. Their voices came at different times, with different motivations, arguably diminishing their force and impact. In the intervening time, *Gregg* served as "the beginning of a long line of capital cases in which a majority of Justices made it increasingly clear that they simply were not interested in the social realities of capital punishment."[32] The Justices who have sat on the bench since *Gregg* have, with some exceptions, been disinclined to engage with the alleged problems of racism and innocence in capital punishment.[33]

Stevens, however, who in 1976 turned the tide in favor of the death penalty by joining the plurality decision in *Gregg*, may have turned the tide again by his recently vocalized opposition to the death penalty.[34] Judge Boyce Martin of the Sixth Circuit Court of Appeals, in a 2009 death penalty case, wrote that he was "join[ing] Justice Stevens in calling for 'a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces.'"[35]

On the state level, in Mississippi, Stevens inspired Justice Diaz to openly oppose the death penalty in one of his last written opinions.[36] Noting in *Doss v. Mississippi* that the Eighth

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constraints of our Constitution, see my dissent in *Callins v. Collins* . . . ." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 179 (2005).

[32] CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 12 (2005).

[33] *In re* Davis, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) ("This court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable.").

[34] Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

[35] Wiles v. Bagley, 561 F.3d 636, 642 (6th Cir. 2009) (Martin, J., concurring); *see also In re* Noling, 651 F.3d 573, 576 (6th Cir. 2011) (Martin, J.) ("As Justice Stevens said simply, "[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive. As long as our justice system depends on men and women to make decisions, it will invariably make mistakes.").

[36] Doss v. State, No. 2007-CA-00429-SCT, 2008 Miss. LEXIS 608, at *38 (Miss. Dec. 11, 2008) (Diaz, P.J., dissenting) (opinion withdrawn on grant of rehearing Oct. 22, 2009).

Amendment requires "capital punishment be imposed fairly, and with reasonable consistency, or not at all,"[37] Diaz turned to social science to question the fairness and consistency of Mississippi's death penalty decisions. Diaz pointed out that one-third of the citizens in Mississippi are African American, while half of death row inmates are African American. [38] Ultimately, Diaz eloquently argued: "Just as a cockroach scurrying across a kitchen floor at night invariably proves the presence of thousands unseen, these cases leave little room for doubt that innocent men, at unknown and terrible moments in our history, have gone unexonerated and been sent baselessly to their deaths."[39]

After penning this provoking dissent, Diaz left the bench; *Doss v. Mississippi* was slated for rehearing in 2009, after which the Mississippi Supreme Court found the defendant had received ineffective assistance of counsel.[40] The death sentence was reversed.

III. POLITICAL CONTROVERSY AND THE DEATH PENALTY

On the state level, the death penalty has potent power as a political tool; however, despite the oft-made claims that politicians are merely reflecting constituent demands in their support for the death penalty, studies show that punitive policies, bolstered by politician-driven rhetoric and media campaigns, have preceded public opinion shifts in support of more punitive policies.[41] It is the "tough on crime" language that precipitates constituent support for harsher penalties. The impact of political rhetoric on the death penalty, therefore, is palpable.

The political fear of being viewed as "soft on crime,"[42] as well as the political benefit of support from a constituency that believes in capital punishment, bolsters political affirmation of the death penalty in Mississippi across the political spectrum. As one

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[37] *Id.* at *42-43. (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).

[38] *Id.* at *48.

[39] *Id.* at *49.

[40] Doss v. State, 19 So. 3d 690, 693 (Miss. 2009).

[41] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 14-27 (1997).

[42] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 34-35 (2007).

example, Mississippi Attorney General Jim Hood, a democrat in a conservative state, has overseen and supported the executions of twelve men—more than any other Mississippi attorney general since the death penalty was re-instated in 1981.[43] Weeks after Hood announced he would run for re-election in 2011,[44] his office announced it would seek the execution of three men in one week in April 2010: Gerald James Holland, Paul Everette Woodward, and Joseph Daniel Burns.[45] The unusual request of the triple execution brought attention to Hood especially as the last execution was held two years earlier, and at the time only ten people in total had been executed in Mississippi since the re-instatement of the death penalty.[46] This request was particularly unique—the spokeswoman for Hood commented that the last time back-to-back executions were requested was in 1961.[47] Hood's office failed to note that one of the men, Joseph Burns, had a remaining constitutional appeal to the Supreme Court, and could not be executed at that time.[48]

In May 2011, the attorney general's office again scheduled three executions, before the impending statewide elections of November 2011. Two men were executed, but on the day of Robert

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[43] Indeed, there have been more executions under Attorney General Jim Hood than in the entire twenty-two years preceding his ascension to office. This number is as of March 26, 2012. *See Mississippi and the Death Penalty*, MISS. DEP'T OF CORRS., http://www.mdoc.state.ms.us/mississippi_and_the_death_penalt.htm (last visited Mar. 26, 2012) (As of March 26, 2012, eighteen people had been executed in Mississippi since the re-instatement of the death penalty.).

[44] John O'Brien, *AG Hood Will Seek Re-election*, LEGALNEWSLINE.COM (Mar. 23, 2010, 1:34 AM), http://www.legalnewsline.com/news/226297-ag-hood-will-seek-re-election.

[45] *Hood Requests Execution Dates*, JACKSON FREE PRESS (April 21, 2010). http://www.jacksonfreepress.com/index.php/print_view/37054.

[46] *See Mississippi and the Death Penalty*, *supra* note 43. In 2010, Hood faced a difficult year of fund-raising, especially as two of his biggest benefactors, plaintiff's lawyers Joey Langston and Richard "Dickie" Scruggs, were both in prison for pleading guilty to attempting to bribe judges. The last execution in Mississippi had been that of Dale Leo Bishop, executed on July 23, 2008; this timing coincided with intense criticism of Attorney General Hood specifically for his high profile relationship with Scruggs, and the open written criticism of Hood by a judge.

[47] Jimmie E. Gates, *AG Seeking 3 Executions*, CLARION-LEDGER, Apr. 21, 2010, at 1A.

[48] *Defense Attorneys Say Federal Appeal Pending,* DJOURNAL.COM, http://nems360.com/pages/full_story/push?article-Defense+attorneys+say+federal+appeal+pending%20&id=7184546 (last visited Apr. 11, 2012). Joseph Burns was later executed in July 2010. *See Mississippi and the Death Penalty*, *supra* note 43.

Simon's execution, the U.S. Court of Appeals for the Fifth Circuit granted a stay, ordering a competency hearing for Simon in the Quitman County Circuit Court.[49] Simon suffered a head injury in January 2011 when he fell—or jumped—off his top-level bunk bed.[50] Simon must be competent and able to understand the proceedings in order to be executed; the costs of the additional hearing and experts will be borne by the State.[51]

The cost of Simon's death penalty case was already controversial—it had sparked a lawsuit by Quitman County against the State of Mississippi in 2003.[52] Quitman County challenged the indigent defense system by which the county pays part-time public defenders, rather than a statewide public defender system financed by the State.[53] The cost of prosecuting Robert Simon and his co-defendant Anthony Carr was simply too much. As T.H. Scipper, the Quitman County Chancery Clerk, said at the time: "Let's put it this way . . . Quitman County had a flood in 1989, the Parker trials in 1990-91, and another flood in 1992. All three events were about equal economic catastrophes."[54] According to the 2010 census data, Quitman remains one of the poorest counties in the nation and is still paying for part-time public defenders.[55]

As the new decade continues, the attorney general, the governor, and the district attorneys will face further criticism of

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[49] Sid Salter, *Stay of Execution Granted for Death Row Inmate Robert Simon at the 5th U.S. Circuit for His Role in the Most Heinous Crime This Writer Ever Covered*, MISS. ST. U. LIBR. (May 24, 2011, 11:28 PM), http://blogs.library.msstate.edu/sidsalter/?p=371.

[50] Monica Land, *Lawyers for Death Row Inmate Issued Stay of Execution to File Today*, MISS. LINK (June 6, 2011, 7:45 AM), http://www.mississippilink.com/news/article_c4d26d86-8fee-11e0-8378-001cc4c03286.html.

[51] *Id.* This case is similar to that of Ricky Ray Rector, executed in Arkansas in 1992, but whom some believe was unable to understand his execution. Rector saved the dessert from his final meal to eat before going to bed. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

[52] Quitman Cnty. v. State, 910 So. 2d 1032 (Miss. 2005) (en banc) (affirming the trial court judgment that the county had failed to prove financial injury, and ruling for the State).

[53] *Id.*

[54] Salter, *supra* note 49.

[55] *See Selected Economic Characteristics: 2006-2010 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03&prodType=table (last visited Apr. 11, 2012); Salter, *supra* note 49.

the penal system from the financial hardship it imposes on Mississippi citizens.[56] The economic crisis has brought to public view the intertwined ethical and economic concerns created by the state's current criminal justice system. MDOC Commissioner Chris Epps has been among the first to respond to the linked questions of constitutional and ethical treatment of detainees and the financial reality of imprisonment, but he certainly may not be the last.

In 2008, Epps worked with State Senator Willie Simmons to introduce and pass legislation to amend Mississippi's Truth in Sentencing Law.[57] Originally passed in 1995, the Truth in Sentencing Law required inmates to serve at least eighty-five percent of their prison sentences, instead of serving reduced time based on good behavior in prison.[58] The financial fallout from the Truth in Sentencing Law was dramatic—from 1990 to 2007, the MDOC budget rose from $109.6 million per year to $327 million per year.[59] The 2009 amended law, however, allowed for non-violent offenders to be eligible for parole after serving twenty-five percent of their sentences.[60] Immediately upon enactment, nearly

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[56] *See* Charlie Mitchell, *Death Penalty Getting Costly in Mississippi*, CLARION-LEDGER (Nov. 6, 2005), http://www.cuadp.org/news/CL-20051108.htm (stating poor counties cannot easily afford the increase in taxes necessary to prosecute and defend death penalty cases).

[57] John Buntin, *Mississippi's Corrections Reform*, GOVERNING (Aug. 2010), http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html.

[58] *Id.*

[59] *Id.* The incarceration rate also more than doubled between 1994 and 2008. Ward Schaefer, *Behind Barbour's Prison Rhetoric*, JACKSON FREE PRESS (Feb. 17, 2010), http://www.jacksonfreepress.com/index.php/site/comments/behind_barbours_prison_rhetoric_021710/ (Finding, in reference to recidivism of released inmates, that "[t]hrough August 2009, the state had released almost 3,100 prisoners under the new guidelines. Of those, only 121 returned to prison, and only 5 were arrested for new crimes; the others had their parole revoked for technical violations. That rate of 5 per 3,100, or 0.2 percent, is far below the national recidivism rate of 10.4 percent for the first year after release.").

[60] Buntin, *supra* note 57. Senate Bill (SB) 2136 was signed into law in April 2009. The law was also retroactive, which made twelve percent of the prison population eligible for parole upon its enactment in 2009. *See* American Bar Association: Criminal Justice Section, *Texas & Mississippi: Reducing Prison Populations, Saving Money, and Reducing Recidivism*, AM. BAR ASS'N, http://www2.americanbar.org/sections/criminaljustice/CR203800/PublicDocuments/paroleandprobationsuccess.pdf (last visited Apr. 11, 2012) (discussing the impact of SB 2136, as well as other legislative measures passed in Mississippi to "award[] additional meritorious earned time (MET) and

3000 inmates were eligible for parole, offering the possibility of substantial savings for the state.[61]

Furthermore, the drop in the economy may have been a contributing factor to the 2010 closing of Unit 32, the former maximum security unit that housed death row inmates. Following a lawsuit that challenged the living conditions at Unit 32 as cruel and inhumane, Epps established his own committee to investigate the living situation, and ultimately decided to shut down the unit completely.[62]

Perhaps these changes have financially helped MDOC. On September 20, 2011, Commissioner Epps announced at the Joint Legislative Budget Committee hearings that he was requesting zero increase in budget allocations for prisons for fiscal year (FY) 2013.[63] This was welcome news, as the state budget general fund was down 0.6 percent from anticipated revenues for FY 2013, while $1 billion in additional funding requests were anticipated statewide.[64]

These actions by Commissioner Epps and Senator Simmons may provide some insight into how politicians in Mississippi will respond when other issues related to the death penalty and criminal punishment—previously shaped primarily by moral opinions and controversy—become influenced by economic concerns. The dependence of public support for the death penalty on massive doses of political rhetoric creates an opportunity for another shift in public opinion in the coming years. Perhaps, as journalists pull back the veil on the cost of the death penalty, and of funding for the Mississippi Department of Corrections in general, politicians will modify their rhetoric to align with the rising economic concerns of constituents.

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expand[] the authority to sentence convicted drug offenders to house arrest with electronic monitoring").

[61] *Id.*

[62] *Id.*

[63] *State Budget: Pressure is Building*, CLARION-LEDGER, Sept. 22, 2011, at 6A, *available at* http://www.statebudgetsolutions.org/publications/detail/state-budget-pressure-is-building.

[64] *Id.*; *see also* Elizabeth Crisp, *Lawmakers: Cuts Inevitable: State's Economic Growth 'Near Standstill,'* CLARION-LEDGER, Nov. 16, 2011, at 1A, *available at* http://www.statebudgetsolutions.org/publications/detail/mississippi-economist-growth-appears-to-be-near-a-standstill.

IV. ECONOMICS: BUDGET PROBLEMS

Mississippi, like much of the United States, faces drastic budget cuts, and the difficulty of balancing government services with dwindling financial resources. Moreover, these cuts must occur in the context of Mississippi being statistically the poorest state in the nation,[65] with the largest percentage of people living below the poverty line in the country.[66]

The state's recent fiscal history has been one of severe cuts. In 2009, legislators remained in session until June 30, the final day of the fiscal year, attempting to balance the budget.[67] The result was a 9.4% funding cut across the board for FY 2010.[68] The FY 2011 budget was agreed upon only after across the board cuts of twelve to seventeen percent, and after Governor Haley Barbour had already successively slashed the 2011 budget five times.[69] Politicians seeking re-election in 2011 faced constituents wanting fewer taxes, and the reality was that state revenue shortfalls for FY 2012 were estimated at more than a $1.2 billion drop from FY 2010 revenue levels, which were already low.[70] Some legislators predicted that the state budget would not return to 2008 levels until 2016.[71] As one Mississippi reporter noted in the spring of 2010, something would have to give.[72]

In the midst of the budget balancing in 2010, Governor Barbour was specifically criticized for his use of discretionary funds to support the MDOC rather than to meet other pressing needs for state services.[73] MDOC has consistently had a strong pipeline of funds from the state, as the system has grown to not only house more inmates in state facilities, but also to contract

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[65] *Personal Income Per Capita in Current Dollars, 2007*, U.S. CENSUS BUREAU, http://www.census.gov/statab/ranks/rank29.html (last visited Apr. 11, 2012).

[66] *Persons Below Poverty Level, 2007*, U.S. CENSUS BUREAU, http://www.census.gov/statab/ranks/rank34.html (last visited Apr. 11, 2012).

[67] Sid Salter, Editorial, *Lengthy Legislative Session Likely Even in Tough Times*, CLARION-LEDGER, Jan 6, 2010, at 6A.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Wade Phillips, *Snowden on Mississippi Budget Recovery*, WTOK CHANNEL 11 (June 13, 2011, 7:16 PM), http://www.wtok.com/home/headlines/Snowden_on_Mississippi_Budget_Recovery_123777584.html.

[72] Crisp, *supra* note 64.

[73] *See* Schaefer, *supra* note 59.

with more private prisons.[74] The juvenile inmate population has increased, and in 2011 Mississippi was subject to a class action lawsuit charging juvenile detention centers with cruel and unusual treatment.[75] The pleading charged: "These violations reflect a disorganized, understaffed facility that houses children in brutal, abusive conditions."[76] The case settled in February 2012, after the State agreed to make substantial changes to detention policies, and look for more cost-effective alternatives to juvenile detention centers, such as day treatment and mentoring programs.[77]

With a growing prison population and declining funds for hiring corrections officers, the conditions of detention facilities will continue to be a costly problem. In 2010, as discussed above, the supermax facility at Mississippi State Penitentiary was closed due to a lawsuit alleging inhumane living conditions, and potentially also as a cost cutting measure.[78] Currently, Mississippi has three State prisons, five private prisons, and numerous detention centers.[79] As fiscal realities begin to challenge MDOC's formerly uncontroverted status as a primary funding priority, the

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[74] *Private Prisons*, MISS. DEP'T OF CORRS., http://www.mdoc.state.ms.us/Five%20Private%20Prisons.htm (last visited Apr. 11, 2012).

[75] J.H. *ex rel.* Gray v. Hinds Cnty., 3:11-cv-327-DPJ-FKB, 2011 WL 3047667 (S.D. Miss. June 1, 2011).

[76] Complaint at 2, J.H. *ex rel.* Gray v. Hinds Cnty., 3:11-cv-327-DPJ-FKB, 2011 WL 3047667 (S.D. Miss. June 1, 2011); *see also* Andy Jones, *Juvenile Jail Under Fire,* DISABILITYRIGHTSGALAXY.COM (June 13, 2011), http://disabilityrightsgalaxy.com/2011/06/13/juvenille-jail-under-fire/.

[77] Valerie Wells, *Reforms Coming to Henley-Young*, JACKSON FREE PRESS (Mar. 7, 2012), http://www.jacksonfreepress.com/index.php/site/comments/reforms_coming_to_henley-young_030712/ (detailing a settlement in which the Henley-Young Juvenile Justice Center will focus more on education and suicide prevention, as well as look at alternatives to detention centers).

[78] *See supra* notes 73-76 and accompanying text.

[79] CCA runs four private prisons in Mississippi, which include Delta Correctional Facility in Greenwood, Adams County Correctional Facility in Natchez, Tallahatchie Correctional Facility in Tutwiler, and Wilkinson County Correctional Facility in Woodville. *CCA Facility Locations*, CCA.COM, http://www.cca.com/facilities/?state=MS (last visited Apr. 11, 2012). Operation of Delta Correctional Facility in Greenwood has been suspended as of January 15, 2012. *See Private Prisons, supra* note 74; *see also* WJTV Staff, *Mississippi Correctional Facility Closing Down*, WJTV.COM (Nov. 10, 2011), http://www2.wjtv.com/news/2011/nov/10/mississippi-correctional-facility-closing-down-ar-2684565/.

government will next need to examine one of the main financial investments of the state: the death penalty.

A. Funding the Death Penalty

The economic crisis has increased calls to redirect prison resources because funding is scarce—in direct contrast to the strong rise in correctional expenses over the past twenty years.[80] Between 1988 and 2008, the amount spent on corrections across the nation increased 303%.[81] In the years since, as detailed in a Vera Institute of Justice report, twenty-six states have cut funding for corrections during the economic crisis.[82] The public perception of criminal justice is now being shaped through a view of budget cuts, limited resources, and the high cost of incarceration.[83] As one scholar noted, the financial crisis has impacted the visibility of the correctional system, "exposing policymakers and the public to the financial realities of the correctional apparatus . . . presented as a burden on citizens' wallets, as well as a budget slice at the expense of other important public services."[84] This visibility, and heightened criticism of the cost of the correctional system, lends itself to a move away from the current system.

Cases such as that of Darnell Wilson, who received three life sentences for stealing bras from Kohl's in DeSoto County, cast a stark light on the tremendous costs being borne by taxpayers for questionable gain.[85] Since the beginning of the financial crisis

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[80] In the 2008 fiscal year, states spent approximately $47 billion of general funds on corrections. One in every fifteen state general fund dollars is now spent on corrections. CHRISTINE S. SCOTT-HAYWARD, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), *available at* http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

[81] *Id.*

[82] *Id.*

[83] This view is not new in academia; Gary Becker first introduced a cost-benefit approach to analyzing the criminal justice system. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174 (1968).

[84] Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 16 (2010). Aviram coins the term, "humonetarianism," focusing on changes in the criminal justice system that may appear largely humanitarian but arise from economic motives, especially apparent during fiscally difficult times. *Id.*

[85] *Repeat Offender Gets Life in Jail After Mississippi Bra Theft*, FOX NEWS (June 25, 2010), http://www.foxnews.com/us/2010/06/25/mississippi-judge-orders-bra-thief-

there has been a nationwide increase in early releases of non-violent inmates, prison closures, increased use of probationary sentences, and decriminalization of marijuana.[86] These changes have been embraced and promoted by individuals across the political spectrum, most notably by Newt Gingrich and the conservative Right on Crime Campaign.[87] These changes are not necessarily a move away from punitivism, but rather a reaction to financial realities that demand change—and perhaps a change in the ethics of punishment to comply with these realities.

Although the current prison system is successful in its primary goal—incarceration and incapacitation—the system as it functions now becomes only more entrenched and more demanding of resources each passing year, with no foreseeable end. As Mississippi has sentenced more people to prison, the recidivism rate has likewise increased. State funds pay to chart and control inmates after they leave prison; this observation system has revealed the stigma of a prison sentence. A felony record leads to heightened difficulty in finding lawful work after being released. This cycle of rotating individuals consistently and continuously through the criminal justice system is demanding more resources than our society can give when financially floundering. U.S. Attorney Kenyen Brown, for the Southern District of Alabama, recently supported a job fair at Bishop State Community College specifically for ex-offenders,[88] and has met with businesses to discuss benefits of hiring former inmates. Because of the expanding population of inmates over the past

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bars/. Wilson was sentenced under Mississippi's three strikes law because he had prior convictions in Tennessee. *Id.*

[86] Several states, including Michigan and New York have closed penal institutions in order to save costs. SCOTT-HAYWARD, *supra* note 80, at 6. Other states are increasing early release programs for completion of education or vocational rehabilitation programs. *Id.* at 9.

[87] Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html; *see also The Conservative Case for Reform*, RIGHTONCRIME, http://www.rightoncrime.com/the-conservative-case-for-reform/ (last visited Apr. 11, 2012) (The face of the Right on Crime Campaign stating "The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers.").

[88] Renee Busby, *Bishop State, U.S. Attorney's Office Help Ex-Offenders Learn Job Skills*, AL.COM (Apr. 15, 2011, 10:23 AM), http://blog.al.com/live/2011/04/bishop_state_us_attorney_south.html.

thirty years, there is also an expanding population of ex-felons. Without work, these individuals will become even more costly to the state. This is yet another consideration in the growing ethics of viewing the fiscal consequences of punishment.

At the highest end of these cost drivers is the death penalty. Excess expenditures for the death penalty are close to $10 million annually per state.[89] For a single death penalty trial, it is estimated a "state may pay $1 million more than for a non-death penalty trial."[90] And yet, only one in every three capital trials even results in a death sentence, leading some to argue that "the true cost of [a] death sentence is $3 million."[91]

The evident conclusion is that pursuing a death sentence is more costly to the state than a sentence of death in prison—otherwise known as life without parole.[92] Maintaining the death penalty is costly because at every stage a capital case is more complex and time-consuming than a non-capital case.[93] Neighboring state Tennessee reports that death sentences cost forty-eight percent more for the state to pursue, rather than life without parole.[94]

The execution itself may ultimately be the least costly part of pursuing a capital case. In Mississippi, the average cost of an execution using lethal injection is $11,400; this figure includes the

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[89] RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 13 (2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

[90] *Id.* at 14.

[91] *Id.*

[92] Memorandum in Support of Expert Testimony Re: Costs of Execution vs. Life Imprisonment Without Release, Connecticut v. Hayes, No. CR07-0241859, 2010 WL 5068356 (Conn. Super. Ct. Oct. 12, 2010) (further stating, "on average, every phase of a capital case is more expensive that (*sic*) in a non-capital case, and the lifetime cost of a capital case is substantially more than the cost of incarcerating an inmate for life without parole. Surprising as that may seem, the reason for it is simple: 'lawyers are more expensive that prison guards.'").

[93] MARK COSTANZO. JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 64 (1997) ("Capital appeals generally cost more than noncapital appeals because of the complexity of the legal issues involved, the number of different issues that can be raised, and the availability of multiple avenues for appeal. Because a high proportion of appeals in capital cases are successful, and because the defendant's life is at stake, there is ample incentive for pursuing every avenue of appeal.").

[94] *Death Penalty Cost*, AMNESTYINTERNATIONAL.ORG, http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-cost (last visited Apr. 11, 2012).

injected drugs, use of facilities, security, overtime, and psychiatric counseling for guards.[95] This is less than the cost of experts alone in a federal capital case, which average $83,029, in contrast to non-capital federal case expert costs of $5,275.[96]

V. States Abolishing the Death Penalty Because of the Cost

It is perhaps unsurprising that the death penalty—a punishment that looms large in the imagination and consciousness of Americans, but in reality is used proportionally little[97]—is the first to topple when faced with financial realities. Despite the historic and visceral importance of this most extreme punishment, which has caused many to turn a blind eye to past criticisms, the fiscal crisis has created an opportunity to rethink the place of the death penalty in the American criminal justice system. Perhaps because financial considerations can provide an ostensibly apolitical analysis of the death penalty, they will be effective at raising questions about the death penalty's value in a capitalist society and market. Therefore, budget-conscious legislators—not the courts—may finally end the death penalty.

According to the Death Penalty Information Center (DPIC), sixteen states currently do not impose the death penalty.[98] Of those that do, the question becomes how often the death penalty is implemented. Kansas and New Hampshire have not held an execution since 1976.[99] The national average of time spent on

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[95] E-mail from Tara Booth, Office of Commc'ns, Miss. Dep't of Corrs., to author (Feb. 1, 2012) (on file with author).

[96] Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 31 (Sept. 2010) *available at* http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf#page=48.

[97] Richard C. Dieter, Death Penalty Info. Ctr., A Crisis of Confidence: Americans' Doubts About the Death Penalty 6 (2007), *available at* http://www.deathpenaltyinfo.org/CoC.pdf.

[98] Death Penalty Info. Ctr., *supra* note 4, at 1.

[99] *Executions per Death Sentence*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/executions-death-sentence (last visited Apr. 11, 2012).

death row, between sentencing and execution, was 153 months in 2007.[100]

In 2009, eleven states that currently impose the death penalty introduced bills to repeal it.[101] The New Hampshire House voted to repeal the death penalty in 2009, but the bill died in the senate.[102] Connecticut passed a bill to repeal the death penalty, but Governor Jodi Rell vetoed it.[103] The Colorado House passed a bill to repeal the death penalty, but the bill lost by one vote in the senate.[104] Maryland, while not abolishing the death penalty, passed a bill that significantly limited the classes of death-eligible crimes. In 2010, seven states introduced bills to place a moratorium on the death penalty or abolish it completely.[105] In 2011, nineteen states introduced bills to either establish a moratorium on the death penalty, urge prosecutors to limit capital cases, or abolish the death penalty entirely.[106] Nearly one-third of the thirty-five states that impose the death penalty have questioned its continued imposition and value since the financial crisis.

In 2012, Connecticut, Maryland, and Oregon all seriously challenged—or changed—the death penalty in their respective states. The Connecticut legislature passed Senate Bill 280 on

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[100] TRACY L. SNELL, BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2007 – STATISTICAL TABLES tbl.11 (2007), *available at* http://www.bjs.gov/content/pub/html/cp/2007/tables/cp07st11.cfm; *Time on Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/time-death-row (last visited Apr. 11, 2012); *see also* NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW USA (2009), *available at* http://naacpldf.org/files/publications/DRUSA_Winter_2009.pdf.

[101] *See* DIETER, *supra* note 97, at 14. The states are Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, Texas, and Washington. *Id.*

[102] Lauren R. Dorgan, *House Votes to Repeal Death Penalty*, CONCORD MONITOR (Mar. 26, 2009), http://www.concordmonitor.com/article/house-votes-to-repeal-death-penalty.

[103] Christopher Keating, *Rell Vetoes Bill to Abolish Capital Punishment*, HARTFORD COURANT, June 6, 2009, at A3.

[104] Jessica Fender, *Colorado Death Penalty Survives*, DENVER POST (May 7, 2009, 12:30 AM), http://www.denverpost.com/news/ci_12312533.

[105] *2010 – Proposed or Passed Legislation*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/2010-proposed-or-passed-legislation (last visited Apr. 11, 2012).

[106] *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/recent-legislative-activity (last visited Apr. 11, 2012).

April 11, 2012, abolishing the death penalty in Connecticut.[107] Although a proposed bill to end the death penalty in Maryland was slated to fail,[108] over three dozen Maryland attorneys, including former Governor Harry Hughes and former Attorneys General Stephen Sachs and Joseph Curran, joined an extensive report analyzing the rising costs and challenges of the death penalty in Maryland.[109] Finally, on November 22, 2011, Oregon Governor John Kitzhaber announced a moratorium on the death penalty for the remainder of his term in office.[110] Governor Kitzhaber oversaw the only two executions in Oregon in 49 years while he was previously in office.[111]

While most of the bills introduced from 2007 to 2012 failed,[112] New Jersey, New Mexico, Illinois, and Connecticut abolished the death penalty in 2007, 2009, 2011, and 2012 respectively. At the beginning of the financial crisis, in December 2007, New Jersey became the first state in four decades to abolish the death penalty through the legislative process.[113] The New Jersey Death Penalty Study Commission ultimately concluded the re-victimization of victims' families, the high financial costs, and the risk of executing innocent people were sufficient reasons to repeal the death

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[107] *See generally* CONN. NETWORK TO ABOLISH THE DEATH PENALTY, http://www.cnadp.org (last visited Apr. 17, 2012); Daniela Altimari, *House Votes to Repeal the Death Penalty: Measure Awaits Malloy's Signature*, HARTFORD COURANT (April 12, 2012), http://articles.courant.com/2012-04-12/news/hc-death-penalty-house-vote-0412-20120411_1_death-penalty-capital-punishment-repeal-bill.

[108] David Nyczepir, *Maryland Death Penalty Repeal Bill Likely to Die in Committee*, CAPITAL NEWS SERV. (Mar. 7, 2012), http://www.cnsmaryland.org/2012/03/07/maryland-death-penalty-repeal-bill-likely-to-die-in-committee.

[109] *See generally* MARYLAND'S DEATH PENALTY: STILL HERE, STILL UNFAIR. MORE ARBITRARY AND COSTLY (2012), *available at* http://mdcase.org/files/DP_Report.pdf.

[110] Helen Jung, *Gov. John Kitzhaber: Oregon death penalty fails 'basic standards of justice,'* OREGONIAN (Nov. 22, 2011, 7:13 PM), www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_oregon_deat.html.

[111] GOV. KITZHABER STATEMENT ON CAPITAL PUNISHMENT (Nov. 22, 2011), http://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf.

[112] *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/recent-legislative-activity (last visited Apr. 11, 2012).

[113] Act of Dec. 17, 2007, ch. 204, § 1, 2007 N.J. Laws 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 2008)). For a more extensive discussion of the repeal of the death penalty in New Jersey, see Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation's "Evolving Standards of Decency,"* 15 MICH. J. RACE & L. 223 (2009).

penalty and impose life without parole.[114] In New Mexico, Governor Bill Richardson, a proponent of the death penalty, specifically stated in signing his state's bill repealing the death penalty that the financial cost of imposing the death penalty was a consideration.[115] Illinois Governor Pat Quinn signed into law a bill abolishing the death penalty due to a central concern over the cost of the death penalty in the face of massive statewide budget cuts.[116]

As a comparison, California could save, by current estimates, as much as $1 billion in five years if the state eliminated the death penalty.[117] In an op-ed for the *Los Angeles Times*, Los Angeles District Attorney John Van de Kamp made clear, "it costs $125 million a year more to prosecute and defend death penalty cases and to keep inmates on death row than it would simply to put all those people in prison for life without parole."[118] On November 6, 2012, citizens of California are set to decide for themselves on the value of the death penalty by their vote on the "Savings, Accountability, and Full Enforcement for California Act."[119] California has spent $4 billion on the death penalty since 1978, during which time thirteen individuals were executed.[120] The bill proposes to transfer the money set aside for death penalty

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[114] N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

[115] *See* de Leon, *supra* note 5. Like Mississippi Supreme Court Justice Oliver Diaz, Richardson's other main concern was the conviction of innocent men after four men were exonerated from New Mexico's death row. Press Release, State of N.M., Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), *available at* http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf.

[116] *See, e.g.*, Tom Kacich, *supra* note 7; Massingale, *supra* note 7.

[117] Natasha Minsker, *Save $1 Billion in Five Years—End the Death Penalty in California*, ACLU (May 21, 2009, 4:52 PM), http://www.aclu.org/2009/05/21/save-1-billion-in-five-years-end-the-death-penalty-in-california. This would include eliminating the need to create a new death row facility. *Id.*

[118] John Van de Kamp, Editorial, *We Can't Afford the Death Penalty*, L.A. TIMES, June 10, 2009, at A23.

[119] Bob Egelko, *Bid to End Death Penalty Headed to the Ballot*, S.F. CHRON., Mar. 2, 2012, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/03/01/MNO21NEQAR.DTL.

[120] Ravali Reddy, Battle Shaping Up for November Death Penalty Vote, PENINSULA PRESS (Mar. 28 2012), http://peninsulapress.com/2012/03/28/battle-shaping-up-for-november-death-penalty-vote/.

related costs to a fund for assisting state law enforcement.[121] Fiscal challenges and calculation-based conversations about the cost of the death penalty are occurring nationwide.

VI. Two Cases Highlighting Problems with the Death Penalty in Mississippi: *Woodward v. State* and *Brewer v. State*

When one challenges the death penalty on economic grounds, the first response is often to query whether something within the death penalty system can be cut, rather than the system itself. A brief review of two recent Mississippi death-penalty cases reveals that, despite its massive expense, the current system frequently fails to adequately protect defendants' rights in the initial trial phase. This failure makes the expensive post-conviction phase utterly necessary. Any cuts to the death penalty system that do not end the death penalty itself will create constitutional violations—not to mention affronts to Americans' sense of fair play.

The common factors in the cases of Kennedy Brewer and Paul Woodward—shared with many other death penalty cases in Mississippi and across the country—are the lack of adequate representation at the trial level, and the almost inevitable reversals, post-conviction motions, and re-trials that follow on the basis of biases to the detriment of the defendant. For Woodward, his initial death sentence was reversed and his case remanded for a new trial on the sentencing phase.[122] For Brewer, his conviction

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[121] *See id.*

[122] Woodward v. State, 635 So. 2d 805, 812 (Miss. 1993). This alone has been controversial, whether a jury can determine the sentence when it does not know the evidence put forward in the guilt phase, and whether the defendant can properly rebut what the state puts forward as fact. It is not unusual for a person on Mississippi's death row to have had multiple trials. *See* Flowers v. State, 947 So. 2d 910 (Miss. 2007); Flowers v. State, 842 So. 2d 531 (Miss. 2003); Howard v. State, 853 So. 2d 781 (Miss. 2003); Flowers v. State, 773 So. 2d 309 (Miss. 2000); Howard v. State, 701 So. 2d 274 (Miss. 1997). Eddie Lee Howard is currently on death row after having his first conviction reversed, resulting in two full trials. He has challenged his most recent conviction yet again, claiming he is innocent. Howard v. State, 49 So. 3d 79 (Miss. 2010). Curtis Flowers, who has also proclaimed his innocence, is on death row after six separate full trials, each either resulting in a hung jury or a reversal on appeal. *See Flowers*, 947 So. 2d at 910 (Miss. 2007).

was affirmed on direct appeal,[123] his motion for post-conviction relief was denied,[124] and it was only when presented with DNA evidence excluding Brewer that he was granted an evidentiary hearing.[125] Execution dates were set for both men; however, Woodward was executed on May 19, 2010, while Brewer was exonerated on February 15, 2008.

Both of these men might never have been placed on death row if a number of circumstances common in other states existed here—if Mississippi funded statewide public defender offices to handle criminal cases,[126] if the defendants had dedicated trial counsel, or if they lived in a state that simply held death penalty sentences to strict scrutiny on appeal.[127] Both were convicted before the Mississippi legislature passed the Capital Defense Litigation Act in 2000, creating the Office of Capital Defense Counsel to ensure representation for individuals on death row.[128] Death is supposed to be "different,"[129] and yet these cases illustrate how death penalty representation, and the process through which these cases proceed, face the same problems as criminal cases in general. Although the permanency of the death penalty is what should make it "different," all too often the case treatment is no different than any other.

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[123] Brewer v. State, 725 So. 2d 106, 112, 136 (Miss. 1998).

[124] Brewer v. State, 819 So. 2d 1165, 1166, 1169 (Miss. 2000).

[125] *Id.* at 1174.

[126] The state legislature did create the Office of State Public Defender in 2011, in part to provide recommendations for a future unified statewide trial-level system. *See generally* OFFICE OF STATE PUB. DEFENDER, http://www.ospd.ms.gov/index.htm; Press Release, GovernorBarbour.com, Gov. Barbour Appoints Lee as First State Public Defender (June 9, 2011), *available at* http://www.governorbarbour.com/news/2011/jun/6.9barbourappointsleepublicdefender.html.

[127] As of July 1, 2010, 121 death cases affirmed, forty-two cases reversed for guilt and sentencing (*Flowers* accounts for three of these cases), seven remanded and commuted to life sentences, and thirty cases reversed and remanded for a trial on sentencing only. Gillett v. State, 56 So. 3d 469 app. at 535-40 (Miss. 2010).

[128] MISS. CODE ANN. §§ 99-18-1, -3 (West, Westlaw through 2011 Reg. Sess.).

[129] "This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411 (1986); *see also* Griffin v. State, 557 So. 2d 542, 552 (Miss. 1990) ("In capital murder cases this Court has applied a heightened standard of review . . . .").

A. Woodward v. State*: Ineffective Assistance of Counsel*

Woodward v. State demonstrates the necessity of post-conviction representation and sufficient appeals as safeguards in capital cases.[130] Paul Everette Woodward was convicted of capital murder, kidnapping, and sexual battery in 1988.[131] On direct appeal Woodward's claims were rejected and the verdict and sentence of death upheld.[132] During the post-conviction phase, a strong and established office through research, investigation, and legal writing alerted the Mississippi Supreme Court of the extensive faults at trial. In the face of the severe problems at Woodward's trial, the court granted post-conviction relief and reversed the death sentence, remanding the case for re-sentencing by a new jury.[133]

As in many death penalty cases reviewed on post-conviction, Woodward's post-conviction counsel claimed ineffective assistance of counsel at trial under *Strickland v. Washington*.[134] Indeed, the behavior of Woodward's trial counsel was egregious and prejudicial to his case: first, Woodward's counsel made no opening statement;[135] second, they intentionally "sat with their backs to [their client] during the course of the trial," later stating that they thought that behaving otherwise might incite the audience to physically act out against them;[136] third, they failed to cross-examine all ten State witnesses;[137] and fourth, defense counsel not only complimented the district attorney, but also assisted a State witness in identifying Woodward.[138] Defense attorneys have the same obligation to zealously advocate for their clients in Mississippi as in the rest of the country.[139] And yet, in closing,

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130 533 So. 2d 418 (Miss. 1988).

131 *Id.* at 421.

132 *Id.* at 435.

133 Woodward v. State, 635 So. 2d 805, 812 (Miss. 1993).

134 *Id.* at 808-09; *see also* Strickland v. Washington, 466 U.S. 668 (1984).

135 *Id.* at 808

136 *Id.*

137 *Id.*

138 *Id.*

139 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007); MISS. RULES OF PROF'L CONDUCT R. 1.3 (1987) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

defense counsel stated to the jury that Woodward was guilty[140] of kidnapping and murder.[141] In his own words, Woodward's defense counsel stated, "Rhonda Crane obviously in her lifetime was a fine Christian lady . . . I've never lied to Juries and I'm not going to start now, I think Paul Woodward is guilty of kidnapping Rhonda Crane, and I think Paul Woodward is guilty of the murder of Rhonda Crane."[142] The district attorney's request for a mistrial was denied, and the jury was dismissed to deliberate. The jury returned with a guilty verdict after only an hour and fifteen minutes.[143]

In the sentencing phase of the trial, defense counsel relied on a mental illness defense to spare their client from the death penalty. The defense's psychological expert was the only witness presented at the entire trial, through both the guilt and sentencing stages of the case. Woodward's counsel, however, failed to speak with their witness until five minutes before the witness testified.[144] In their brief conversation, Woodward's counsel incorrectly told the witness he could not speak of psychological exams performed on Woodward.[145] The expert witness did testify to Woodward's lack of self-confidence[146] and repeated suicide

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[140] *Woodward*, 635 So. 2d at 808. Of multiple claims of ineffective assistance of counsel, the Mississippi Supreme Court addressed one in particular—whether Woodward's attorney admitted Woodward's guilt of the crime. *Id.* The court, however, found under *Strickland* that this action was not necessarily prejudicial, reasoning that defense counsel's behavior could have been tactical. *Id.* at 808-09. Furthermore, the court felt that the action did not "undermine confidence in the outcome" because of the other evidence against Woodward. *Id.* at 809 (quoting *Strickland*, 466 U.S. at 694).

[141] *Id.* at 808.

[142] Transcript of Record at 1416, Woodward v. State, 635 So. 2d 805 (Miss. 1993).

[143] *Id.* at 1430.

[144] *Woodward*, 635 So. 2d at 809. As became clear in post-conviction when Woodward claimed ineffective assistance of counsel under *Strickland*, one of the ways that Woodward's trial counsel failed him was in not interviewing the State's rebuttal psychological expert witness before he took the stand. *Id.*

[145] *Id.* at 810. Defense counsel incorrectly told the witness he could not speak of psychological exams performed on Woodward because that would open the door to prior bad acts. *Id.* This admonition was incorrect and castrated the expert's testimony, depriving it of its full usefulness as mitigating evidence. *Id.* at 812 (Smith, J., concurring in part and dissenting in part).

[146] Other findings by the clinical psychologist for the defense included:

> His father abused him as a child . . . . His school history was one of not being happy at school. He did not seem to fit in; he didn't have friends . . . . He felt like nobody liked him as a child . . . . By the time he was fourteen, he was so

attempts;[147] however, Woodward's counsel failed to ask the witness about Woodward's detailed psychological history, and the witness did not present documentation that Woodward suffered from severe mental disturbance at the time of the crime.[148] The witness testified only that his evaluation showed that "Woodward was able to distinguish between right and wrong at the time of the crime."[149] As the court stated, "[counsel] incorrectly instructed [the expert witness] and unnecessarily limited his testimony apparently based on a misunderstanding of evidentiary rules. . . . They simply did not do their homework."[150]

With little mitigation evidence of mental illness, defense counsel was forced to argue that the jury should spare their client's life because of "redeeming love." Defense counsel, now giving his second closing argument, told the jury that "he could not ask the jury to spare the defendant's life on the facts of the case."[151] In sum, defense counsel argued that the crime was unforgiveable and deserving of the death penalty.[152] The jury was

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> dissatisfied with life that he attempted suicide. He has made perhaps at least three suicide attempts up to the present time. He feels very inferior, very unloved, very unwanted . . . his whole history from the time he can remember up to the present time has been one of rejection, disapproval, feeling alienated from his family, from his friends, from his schoolmates, from the community in general, and so it's been a very unhappy life that he's lead up to this point.

Transcript of Record at 1474-76, Woodward v. State, 635 So. 2d 805 (Miss. 1993).

147 *Id.* at 1486-87.

148 *Woodward*, 635 So. 2d at 810. Despite the paucity of this testimony, the defense counsel relied solely on a mental illness defense as a mitigating factor for the jury to consider against sentencing Woodward to death. *Id.*

149 *Id.*

150 *Id.* at 812 (Smith, J., concurring in part and dissenting in part).

151 *Id.* at 809. Specifically, the defense attorney stated:

> And that's what's called redeeming love. In this case, I realize that will probably never happen. I don't know. You say, how could you ask me to spare Paul Woodward's life? How could any lawyer come and ask you to do it? I can't ask you to do it on the facts. No, I can't. They're terrible. I'm going to be honest with you. I can't ask you to do it on the facts. There's only one way that I can ask you to spare his life, and that's on redeeming love. That's the only way. I know whatever your decision will be, it will be fair and just.

Id. at 810 (emphasis in original).

152 *Id.*

left with one alternative: to allow "redeeming love" to guide them in their sentencing decision.[153]

As the Mississippi Supreme Court pointed out, "redeeming love" is not a statutory mitigating circumstance that the jury can consider when sentencing. The court cogently noted, "[t]he counsel's statement above to the jury severely prejudiced any chance Woodward had to receive a life sentence from this jury. . . . [D]efense counsel's argument to the jury told them that they could not spare Woodward's life."[154]

The Mississippi Supreme Court, in reversing the case both because defense counsel did not effectively pursue a mental health mitigation strategy and because defense counsel condemned the client, noted "[d]efense counsel had to argue redeeming love because he and his co-counsel failed to present much of a case in mitigation."[155] Defense counsel failed to call any personal witnesses during the mitigation stage, despite the fact that Woodward's mother was present and available to testify.[156] As one concurrence stated, "[t]he failure to call any witness who could humanize the defendant cannot be justified as an effective strategy."[157] Indeed, defense counsel failed to develop or implement any valid strategy. Relying on a mental illness defense, while having only one witness to that defense, and then curtailing that witness' testimony, undermined Woodward's only defense.[158]

Without post-conviction counsel, which is mandated for all individuals on death row in Mississippi, these issues would have gone unaddressed.[159] The counsel on direct appeal, one of the same individuals who represented Woodward at trial, failed to

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[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 813 (Smith, J., concurring in part and dissenting in part).

[157] *Id.*

[158] The case was also reversed and remanded for re-sentencing because the jury was incorrectly instructed regarding "the especially heinous, atrocious or cruel" aggravating circumstance. *Id.* at 811-12.

[159] Although Woodward's post-conviction attorneys were only able to make limited claims, one of those claims was ineffective assistance of trial counsel—a claim not procedurally barred because the same counsel represented Woodward on direct appeal—thus allowing the issue to be raised by separate counsel in a post-conviction appeal. *Id.* at 807-08.

raise the majority of these issues.[160] Despite the costs, post-conviction appeals and new trials are necessary for the death penalty in Mississippi to remain constitutional and consistent with American beliefs in justice.[161]

B. Brewer v. State*: Newly Discovered DNA Evidence of Innocence*

While partially analogous to the *Woodward* case in emphasizing the importance of the appellate and post-conviction process, the *Brewer* case is also an example of the importance of safeguards to test, store, and allow newly discovered evidence before the court. Mississippi's first DNA Task Force, charged with recommending statewide procedures for preserving, cataloguing, and testing biological evidence, was created by statute in May 2008.[162] The Task Force was formed partly in response to the exonerations of Levon Brooks and Kennedy Brewer in Noxubee

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[160] Woodward v. State, 533 So. 2d 418, 420 (Miss. 1988).

[161] Other constitutional concerns were present at Woodward's trial. Woodward's case directly implicated the Fourth Amendment. Police searched Woodward's truck for evidence twice, yet only asked for consent to search the first time. *Id.* at 426. The Mississippi Supreme Court, lacking notable precedent on the issue, looked to the Tennessee Supreme Court, which in a similar situation ruled that the second search was "merely a continuation of the first." *Id.* at 427. The Mississippi Supreme Court thus stated the second search in Woodward's case was "authorized and reasonable, and that therefore the evidence was the result of a lawful search." *Id.* Without any further deliberation on the issue or attention to authority or case law, the court moved to deny relief to Woodward. *Id.* In Woodward's case on remand, every African American juror on his panel was struck by the prosecution, including an alternate, using peremptory challenges. Woodward v. State, 726 So. 2d 524, 529-30 (Miss. 1998). This left an all white jury that sentenced Woodward to death. *Id.* at 530. The Mississippi Supreme Court noted that Woodward was white, which seemed to imply that this fact nullified any racism in the district attorney's decision and made the decision to strike every single black juror less race-based. *Id.* at 529-30. *But see* EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), *available at* http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf. The Mississippi Supreme Court ruled "the reasons for the strikes were race-neutral" and not for the intentional purpose of excluding African Americans from the jury. *Woodward*, 726 So. 2d at 534. The court finally found that because no alternate jurors were called to serve on the panel, the State's peremptory strike of an African American alternate juror and the fact the trial judge made no ruling on that strike did not prejudice Woodward. *Id.*

[162] STATE OF MISS., 2008 DNA TASK FORCE REPORT 1 (2008), *available at* http://www.clarionledger.com/assets/pdf/D0124061129.pdf.

County in February of that year.[163] Brewer was the first person exonerated in Mississippi through post-conviction DNA testing.[164] The Task Force, composed of prosecutors, defense attorneys, legislators, and judges, suggested amendments to the Mississippi Uniform Post-Conviction Collateral Relief Act.[165] These amendments provided for preservation of DNA as well as accessibility to the courts for post-conviction relief motions based on newly discovered evidence.[166] The proposal was presented to and accepted by the legislature, which ultimately adopted the recommendations of the Task Force and amended the Post-Conviction Collateral Relief Act in 2009.[167]

Surprisingly, the bill faced opposition from the attorney general's office, which in subsequent years encouraged failed legislation to weaken the statute's provisions.[168] While there are fiscal arguments against the evidence-preservation and court-access components of the statute, Brewer's case is an example of the necessity of preserving evidence and allowing for post-conviction relief motions and hearings to safeguard against wrongful convictions and executions.

In May 1995, Kennedy Brewer was convicted of capital murder while committing sexual battery and was sentenced to death.[169] The allegations were that he raped and killed his girlfriend's three-year-old daughter and then deposited her body in a nearby creek where it was found days later.[170] A semen sample was found on the victim's body but was deemed insufficient for DNA testing.[171] The primary evidence that

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[163] *Id.*

[164] Press Release, Innocence Project, *supra* note 16.

[165] STATE OF MISS., *supra* note 162, at 10.

[166] MISS. CODE ANN. § 99-39-5 (West, Westlaw through 2011 Reg. Sess.).

[167] *Id.*

[168] *See, e.g.*, H.B. 1361, 127th Leg., Reg. Sess. (Miss. 2012) (limiting post-conviction DNA testing to sexual assault cases); S. 2448, 127th Leg., Reg. Sess. (Miss. 2012) (imposing additional requirements for exonerees to receive compensation for wrongful conviction; if exoneree gave a false confession, regardless of coercion the exoneree cannot receive compensation for wrongful conviction); S. 2891, 125th Leg., Reg. Sess. (Miss. 2010) (allowing the attorney general's office to be custodian of the biological evidence instead of the Mississippi Crime Lab and allowing the custodian to dispose of the biological evidence, provided a petition to do so has been served to defense counsel).

[169] Brewer v. State, 725 So. 2d 106, 117 (Miss. 1998).

[170] *Id.* at 112-14.

[171] *Id.* at 133-34.

convicted Kennedy Brewer was forensic evidence and the testimony of two medical experts, Dr. Stephen Hayne and Dr. Michael West.[172] Dr. West concluded that he found nineteen marks on the victim's body that were inflicted by Brewer using only his top two teeth.[173] Brewer's direct appeal was denied in 1998, and after his petition for writ of certiorari was denied by the U.S. Supreme Court,[174] the State moved to set an execution date.[175]

Brewer immediately responded by asking for counsel to be appointed for a post-conviction petition, and he filed a pro se petition for post-conviction relief four days later.[176] The Mississippi Supreme Court dismissed the State's motion for an execution date and remanded the case to the trial court for counsel to be appointed.[177] Newly appointed counsel filed a motion for post-conviction relief based on the possibility of exculpatory DNA evidence; this motion was denied by the court in 2000. The court did, however, order the evidence be accessible for DNA testing by Brewer.[178]

In 2001, the New York based Innocence Project became involved in the case and had advanced DNA testing performed on the semen recovered in 1992 from the victim's body.[179] The test results excluded Brewer as the perpetrator.[180] The following year, the Mississippi Supreme Court, in an opinion authored by Justice Graves, granted Brewer's motion for post-conviction relief for an evidentiary hearing to consider the newly-discovered DNA evidence.[181] The trial court vacated Brewer's conviction later that year.

Despite the vacating of Brewer's conviction in 2002, Brewer remained in detention—albeit not on death row—for the next five years.[182] Prosecutor Forrest Allgood intended to retry Brewer for

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[172] *Id.* at 115, 134.
[173] *Id.* at 116.
[174] Brewer v. Mississippi, 526 U.S. 1027 (1999).
[175] Brewer v. State, 819 So. 2d 1169, 1171 (Miss. 2002).
[176] *Id.* at 1171.
[177] *Id.*
[178] *Id.*; *see also id.* at 1168.
[179] Press Release, Innocence Project, *supra* note 16.
[180] *Id.*
[181] *Brewer*, 819 So. 2d at 1176.
[182] Press Release, Innocence Project, *supra* note 16.

capital murder, thus Brewer could not be released on bond.[183] In 2007, Ben Creekmore, then District Attorney of Oxford, Mississippi, was appointed as Special Prosecutor in the Brewer case and decided not to seek the death penalty or oppose bail.[184] Brewer was released in August 2007 while a new trial was pending.[185] Later that year, the attorney general's office intervened and investigated the case, ultimately discovering that the unidentified DNA profile from the semen sample matched Justin Albert Johnson, one of the original suspects.[186] Johnson confessed to the murder as well as to an almost identical crime—the murder of three-year-old Courtney Smith in Noxubee County, Mississippi in September 2000—for which another man, Levon Brooks, had been wrongfully convicted and sentenced to life in prison.[187] Furthermore, Johnson stated that he committed the crimes alone.[188]

On February 15, 2008, charges were dropped against Kennedy Brewer and he was exonerated; in March 2008, Levon Brooks was also exonerated.[189] On February 9, 2012, Justin Albert Johnson pled guilty to the murders of Courtney Smith and Christine Jackson.[190] Due in part to the compelling request by Levon Brooks and Kennedy Brewer that the State not pursue the death penalty, Johnson received a plea agreement for two consecutive life sentences.[191]

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[183] *See* MISS. CONST. art. III, § 29(1) ("Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.").

[184] Ronni Mott, *You're Free to Go*, JACKSON FREE PRESS (Feb. 20, 2008), *available at* http://www.jacksonfreepress.com/index.php/site/comments/youre_free_to_go/.

[185] Press Release, Innocence Project, *supra* note 16.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] Ronni Mott, *'The Nightmare is Over': Levon Brooks Finally Free*, JACKSON FREE PRESS (Mar. 13, 2008), http://www.jacksonfreepress.com/index.php/site/comments/the_nightmare_is_over_levon_brooks_finally_free/.

[190] Carmen K. Sisson, *Noxubee Man Gets Life Sentence for Rape, Murder*, COLUMBUS DISPATCH (Feb. 10, 2012, 10:19 PM), http://www.cdispatch.com/news/article.asp?aid=15589.

[191] Interview with Levon Brooks, in Kansas City, Mo. (Mar. 30, 2012). The victims' families also requested that the State not seek the death penalty against Justin Albert Johnson. *See* Sisson, *supra* note 190.

The markings on the victim's body that Dr. West identified as bite marks made by Kennedy Brewer were determined to be bug bites and the result of the victim's body remaining in the creek for numerous days.[192] The same result was found for the alleged bite marks on the child victim in Levon Brooks's case. Dr. West had been suspended from the American Board of Forensic Odontology and, by 2009, was no longer assisting in criminal investigations for the State.[193]

Dr. West did, however, leave behind a swath of cases where the convictions turned on his testimony. In a statement to the press in August, 2011, Attorney General Jim Hood stated that his office was personally investigating twenty cases in which Dr. West had testified.[194] Then, on October 25, the attorney general's office conceded in court that they had simply conducted a Westlaw search for cases involving Dr. West.[195] Following the Fall 2011 elections and the re-election of Attorney General Jim Hood, all investigation of cases that included West's testimony apparently ceased. This, despite the deposed statement of Dr. West on February 11, 2012, that "I thought [a bite mark] was as unique as

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[192] *Id.*

[193] *See id.*; *see also* Radley Balko, *Leigh Stubbs, Mississippi Woman, Serving 44-Year Sentence Despite Discredited Testimony*, HUFFINGTON POST (Aug. 9, 2011, 5:36 PM), http://www.huffingtonpost.com/2011/08/09/leigh-stubbs-michael-west-forensics-discredited-testimony_n_922219.html.

[194] Sheri Falk, *Part Three: The Innocence Project Takes on Collins Woman's Case*, WDAM (Aug. 19, 2011, 7:08 PM), http://www.wdam.com/story/15300146/part-two-the-innocence-project-takes-on-collins-womans-case (describing the case of Leigh Stubbs, whose conviction was based largely on Dr. West's varied testimony of expert video analysis, gynecological injuries, and bite marks); *see also* Balko, *supra* note 193.

[195] Stubbs v. Mississippi, No. 2011-288-LS-LT, slip op. at 91 (Lincoln Cnty. Cir. Ct. Oct. 25, 2011). At the discovery hearing for Leigh Stubbs on October 25, 2011, Marvin Sanders of the Attorney General's office informed the court that he had been charged with the investigation of Dr. West's cases. He further stated:

> BY MR. SANDERS: Your Honor, if I may. You did order us to provide information about our investigation into Dr. West. I was tasked by the attorney general to do an investigation. To be honest with you, I have not conducted any formal investigation. I pulled all of his cases just via Westlaw search and just have not had time to review them for any . . .
>
> BY THE COURT: Okay.
>
> BY MR. SANDERS: . . . forensics or whatever.

Id.

a fingerprint . . . I no longer hold that opinion . . . my opinion of the uniqueness of bite marks was in error."[196]

These actions and statements bring home the point that forensic fraud has tainted an enormous number of cases over the past two decades in Mississippi, including death penalty cases.[197] In order for the cases of innocent individuals to be uncovered, criminal appeals, the preservation of evidence, and accessibility to the courts based on new evidence all play crucial roles.

Kennedy Brewer was an innocent man weeks away from being executed. The possibility of executing an innocent individual should give one serious pause when considering reducing the cost of the death penalty by limiting access to courts and the preservation of evidence.

CONCLUSION

As the execution of Paul Woodward and the exoneration of Kennedy Brewer make clear, the death penalty is a punishment unevenly distributed, often revoked due to trial errors, and ultimately imposing lengthy, exhausting, and costly responsibilities on the state. Unfortunately, these responsibilities require an ample amount of both time and money. Moreover, the only benefits of the death penalty appear to have largely gone to politicians using fear to manipulate voters, rather than to citizens seeking justice.[198] During the current economic crisis, the state is forced to make budget cuts to continue funding the death penalty. As other states, and constituents across the nation, have become more aware of these sacrifices, they have become less willing to take such a punitive stance and maintain their commitment to the death penalty. Indeed, if Mississippi turns away from the death penalty, it will be due to the stark financial crisis that impacts all Mississippi citizens. Just as the view of the death penalty is changing nationwide, the dialogue is changing in Mississippi.

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[196] Videotaped Deposition of Dr. Michael West, Stubbs v. Mississippi, No. 2011-288-LS-LT, slip op. at 81-82 (Lincoln Cnty. Cir. Ct. Feb. 11, 2012).

[197] *See, e.g.*, Balko, *supra* note 193.

[198] *See, e.g.*, Sid Salter, *Renewing the Death Penalty Debate in Mississippi No Simple Matter*, PICAYUNE ITEM (Apr. 23, 2011), http://picayuneitem.com/opinion/x1812412311/Renewing-the-death-penalty-debate-in-Mississippi-no-simple-matter/print.

Ultimately, Mississippi may see an end to the death penalty sooner than an end to the financial recession, but it is possible the two will leave jointly.

RESCUING OPHELIA: *AVOYELLES SPORTSMEN'S LEAGUE* AND THE BOTTOMLAND HARDWOODS CONTROVERSY

*Oliver A. Houck**

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INTRODUCTION

The winter of 1977 it hardly rained. Spring backwaters from the Red River and a dozen bayous never came out of their banks, leaving the earth hard and forests of bottomland hardwoods tinder dry.[1] It was not long before enormous machines came in to knock them down, push them into windrows and set them on fire. Marc

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[1] *Marksville Rainfall Annual Report*, AVOYELLES J., Jan. 20, 2009. *See generally* Bruce Schultz, *Avoyelles Land Dispute Outlined*, DAILY TOWN TALK, Sept. 3, 1978, at A-1 (discussing land clearing of wetland areas).

Dupuy, an attorney who represented several landowners at the time, recalled:

> The bulldozers would start in the morning, very early, and they would line up in tandem, one behind the other, staggered. These were D-9's with cutting blades. They would walk through the timber and the timber was falling like matchsticks. And they would of course swing around and come back the other way. Later on that afternoon, they would all line up and park in a line. A crew would come in and sharpen the blades and blow out the dust and the leaves from the radiators, and refill the fuel tank. It was like a military operation. When the cutting was being done it was like Rommel's tanks across Africa. They were moving across [the tract] and dust was swirling and the trees were falling and smoke was coming up. It was an unbelievable sight.[2]

It was a scene from Dante's *Inferno*. Few would have imagined it was taking place in a wetland. Fewer still that it violated, of all things, federal water law. No one could have predicted it would lead to hard-fought litigation pitting federal agencies against each other on the ground, in a small courtroom in Alexandria, Louisiana and in government halls across Washington D.C. And, at the end of the day, recalibrate the balance of power in water resources development. The cases would be known as *Avoyelles Sportsmen's League*.[3]

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[2] Telephone Interview by Endre Szalay with Marc Dupuy, Attorney at Law, Dupuy & Didier (July 14, 2009) [hereinafter Dupuy July Interview]. Mr. Dupuy arranged federal loans for several land-clearing operations in the area and represented several landowners and banking interests in the *Avoyelles* litigation. *Id.*; Telephone Interview by Endre Szalay with Marc Dupuy, Attorney at Law, Dupuy & Didier (May 31, 2011) [hereinafter Dupuy May Interview]; Telephone Interview with Marc Dupuy, Attorney at Law, Dupuy & Didier (Oct. 31, 2011) [hereinafter Dupuy Oct. Interview].

[3] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL IV*), 786 F.2d 631 (5th Cir. 1986); Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897 (5th Cir. 1983); Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981); Avoyelles Sportsmen's League v. Alexander (*ASL I*), 473 F. Supp. 525 (W.D. La. 1979).

I. AN UNUSUAL PLACE

Avoyelles Parish, Louisiana 1960–1980. Avoyelles Parish straddles a physical and cultural fault line across central Louisiana. To the north are pine and hardwood forests, and a very conservative people. Michael Osborne, who represented plaintiffs in the case, described them some years later as largely "protestant . . . sincere, [and] formal people. . . . Men in their fifties," he recalled, "call their neighbors of twenty years or more 'Mister.' They like country/western and gospel music. They are hunters and fishermen and rodeo lovers . . . and when they gather on Saturday afternoon they drink iced tea. They have names like Smith or Carpenter."[4]

To the south, the land runs more open to the Gulf of Mexico, and the residents are cut from different cloth. They are "Catholic . . . expressive, [and] open people,"[5] Osborne continued. "They dance the fais do do. They are hunters and fishermen . . . . A popular Saturday night beverage is a beer called Dixie, and they have names like Cheramie which means 'friend of mine' or (phonetically) Rowbear, spelled Robert."[6]

Notable in this description, is the obvious common denominator of these two clans: "they are hunters and fishermen." Together, Wilsons with Labordes, they would bring the *Avoyelles* case. They saw, literally, their land falling around them.

It was an unusual landscape, because it was at times under water. Spring runoff from the north and west would swell the rivers and back up the tributaries that ran into them, sending a reverse flow over all but the highest ridges on the landscape.[7] It might take weeks for the waters to recede; or it might take a month or two.[8] If you were a four-footed creature or had wings you could simply move to higher ground and wait it out, but if you were a tree, the permeating but irregular wetness presented a

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[4] Michael Osborne, Director, Southern Wetlands Project, Keynote Address to the 1981 Annual Conference of the Society of Wetland Scientists: Resource Management, Planning and Priorities in the Lower Mississippi River Valley (May 22, 1981), *in* WETLANDS: THE JOURNAL OF WETLAND SCIENTISTS, Sept. 1981, at 1.

[5] *Id.*

[6] *Id.*

[7] *See ASL II*, 511 F. Supp at 281-82.

[8] *Id.* at 282.

challenge. You would have to adapt, and that, in large part, was the point on which *Avoyelles Sportsmen's League* would ultimately turn.

When the waters did retreat, they left behind new layers of silt and nutrients that fed a chain of vegetation. The Lake Long tract bordering Lake Ophelia in Avoyelles Parish held some 20,000 acres of hardwood trees that were, in turn, a living restaurant for wildlife. Sweet gum, hawthorn, red maple, bitter pecan, and four varieties of oak provided a blanket of mast, berries, and cover for deer, bear, squirrel, ducks, and other species.[9] In old photographs taken from the sloughs and ponds of these forest systems the ducks rise like smoke.[10] Of all the ecosystems in the United States, bottomland hardwoods are a sportsmen's paradise.

They were also, by the 1970s, so heavily hammered by conversion to agriculture that twenty-four million acres along the lower Mississippi had been cut to five million.[11] Those left were disappearing at a rate of some 300,000 acres per year.[12] Before-

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[9] U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV., DOCUMENTATION, CHRONOLOGY, AND FUTURE PROJECTIONS OF BOTTOMLAND HARDWOOD HABITAT LOSS IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN 1 (1979).

[10] Dr. Rex Hancock, *Ducks on the Cache* (photograph) (on file with author) (showing clouds of ducks rising from Cache River/Bayou Deview bottomland hardwoods). Dr. Hancock, an avid sportsman, was instrumental in litigation over a U.S. Army Corps of Engineers project to channelize the Cache River. *See* Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972) (enjoining project); *see also* Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1063 (8th Cir. 1977) (lifting injunction). Shortly thereafter, Congress de-authorized the project. E-mail from James T.B. Tripp, Gen. Counsel, Envtl. Def. Fund, to author (Apr. 19, 2011, 10:36 CST) (on file with author). Mr. Tripp was lead counsel for plaintiffs in these cases, his first taste of bottomland hardwood ecosystems. *See* Telephone Interview with James T.B. Tripp, *infra* note 132.

[11] ROBERT STAVINS, ENVTL. DEF. FUND, CONVERSION OF FORESTED WETLANDS TO AGRICULTURAL USES: AN ECONOMETRIC ANALYSIS OF THE IMPACT OF FEDERAL PROGRAMS ON WETLAND DEPLETION IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN 1935-1984, at 1-2 (1987). *See Bottomland Hardwoods*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/type/wetlands/bottomland.cfm (last visited Apr. 18, 2012); *Mississippi Alluvial Plain*, THE NATURE CONSERVANCY, http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/louisiana/placesweprotect/the-nature-conservancy-in-louisiana——mississippi-river-alluvial-plai-1.xml (last visited Apr. 18, 2012); U.S. DEP'T OF THE INTERIOR, *supra* note 9.

[12] WILLIAM L. WANT, LAW OF WETLANDS REGULATION 2-4 (1990). The figure is conservative. In 1988, the U.S. General Accounting Office estimated the continuing losses at 300,000 to 500,000 acres per year. U.S. GEN. ACCOUNTING OFFICE, GAO-88-

and-after aerial images of this loss are eye-popping.[13] The lion's share of bottomlands remaining were in Louisiana, and according to U.S. Fish and Wildlife agents, the Lake Long tract in Avoyelles, now under the treads of D-9 bulldozers, was the pick of the litter.[14] Dry this particular Spring, it had been flooded three times in the 1970s over all but its highest ridges.[15] In 1973, Marc Dupuy went up in his small propeller plane and saw flood water topping a big yellow bus that hunters used for a camp.[16] In normal years water stood in Lake Long, Lake Ophelia, West Cut Lake, Mouillier a Yor, Mouillier Swamp, Lake Claire, Lac a Paul, Lac Bryondas Chats, Lac Volee, Lac Calebasse, Nichols Lake, Lac Barbue, Pointe Basse and the bayous in between.[17] But 1977-1978 was an unusual year.

Spurred on by their sport hunting constituencies, wildlife agencies started buying up bottomland habitat as rapidly as they could before it was destroyed.[18] The race began in neighboring Mississippi, where a battle had raged for years over the Pascagoula river system . . . an early version of *Avoyelles*.[19] Drawn into the controversy by chance, The Nature Conservancy (Conservancy) made saving the Pascagoula a priority and then moved to acquire more wetland forests, capped by a purchase on the Pearl River funded by the Mississippi legislature and the St. Regis Paper Company.[20] Bottomland hardwoods, it declared, were "the most threatened ecosystem in America."[21]

110, WETLANDS: THE CORPS OF ENGINEERS' ADMINISTRATION OF THE SECTION 404 PROGRAM 2, 20 (1988), *available at* http://www.gao.gov/assets/150/146829.pdf.

[13] STAVINS, *supra* note 11, at 103.

[14] L. L. Gremillion, *Delegation Seeks Aid of Attorney General*, WKLY. NEWS, Aug. 24, 1978, at 1.

[15] *See* Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 282 (W.D. La. 1981).

[16] Dupuy Oct. Interview, *supra* note 2.

[17] *See ASL II*, 511 F. Supp. at 282.

[18] Dupuy Oct. Interview, *supra* note 2; Telephone Interview with Richard Ludington, Senior Assoc., Conservation Fund (May 20, 2011) (Mr. Ludington directed the bottomland hardwood acquisition initiatives of The Nature Conservancy during the 1970s and 1980s, which largely involved advance purchases of wetland tracts before they were put into soybean production.).

[19] For a complete account of this controversy and its resolution, see DONALD G. SCHUELER, PRESERVING THE PASCAGOULA (1980).

[20] Telephone Interview with David Morine, Former Head of Acquisitions, Nature Conservancy (Apr. 18, 2011). Mr. Morine was the director of land acquisitions for The

Then there was Louisiana. The problem here was more acute because the bottomland inventories were greater and completely unprotected . . . and because potential funders did not have a great deal of confidence that the State would protect whatever lands were acquired.[22] Working with the U.S. Fish and Wildlife Service, the Conservancy was able to buy an option on the Singer tract in north Louisiana for the Tensas National Wildlife Refuge, the largest bottomland purchase to date.[23] This was one

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Nature Conservancy from 1972-87. DAVID E. MORINE, GOOD DIRT: CONFESSIONS OF A CONSERVATIONIST ix (1993). He was instrumental in the negotiations over the Pascagoula, the Tensas, and other wildlife refuges in Mississippi and Louisiana. *Id.* at 103-115. The Conservancy's modus operandi was to purchase a desirable tract, or an option to purchase, and hold it for resale to federal or state wildlife agencies, agreed upon in advance. Its corporate fundraising depended, in part, on distinguishing itself from environmental groups, whom it portrayed as the "troublemakers;" the Conservancy was the "peaceful alternative." Telephone Interview with David Morine, *supra*. At the same time, the Conservancy was often quick to call on environmental litigators to stop a particular development so that it could rush in with a purchase offer. *Id. See* Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976) (enjoining highway interchange in southern Mississippi). The habitat around the interchange, via the Conservancy, is now the Mississippi Sandhill Crane National Wildlife Refuge. *See Mississippi Sandhill Crane National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV. http://www.fws.gov/mississippisandhillcrane/ (last visited Apr. 21, 2012).

[21] *See* MORINE, *supra* note 20, at 104 (Questioned by the Conservancy's President, "If you would do any project, what would it be? Morine replied, "Easy . . . bottomland hardwoods. They're almost all gone but if we start now we may be able to save what's left.").

[22] Telephone Interview with David Morine, *supra* note 20 ("[W]e were looking for a reliable partner."). In fact, the Conservancy found a reliable partner in Dewey Wills of the Louisiana Department of Fish and Game, and a state game management area in his name recognizes these contributions. *See Dewey Wills*, LA. DEP'T OF WILDLIFE & FISHERIES, www.wlf.louisiana.gov/wma/2753 (last visited Apr. 21, 2012).

[23] Telephone Interview with David Morine, *supra* note 20. The Louisiana purchase came in major part from a tract owned by the Singer Sewing Machine Company, which was then acquired by the Pfizer Corporation. *Id.* Pfizer, a pharmaceutical company, was not in the land-holding business and was looking for a way to unload the asset. *Id.* When it came time for the federal payment, Louisiana Senator Bennett Johnston managed to pry it from a reluctant Army Corps of Engineers. As Morine tells it, in a small meeting with a Corps general, the Fish and Wildlife Service, and Nature Conservancy officials, the general said that he would not spend Corps money in this fashion, at which point Senator Johnston excused everyone else from the room, leaving him alone with the military. *Id.* A few minutes later the others were invited back in, Johnston announcing with a smile, "[w]e're all set." *Id.* Coincidentally, in the 1930s the Singer tract had hosted the last great stand of old-growth cypress forest in America; it was rapidly deforested to the dismay of ornithologists and others intent on saving the Ivory-Billed Woodpecker. The last confirmed sightings of this legendary bird were on

accomplishment, however, in a landscape of land clearing and so, threat-by-threat, the race continued.

At this juncture, the Lake Long clearing began. Within a forty minute drive lay one federal wildlife refuge and a half-dozen state game management areas with names like Grassy Lake, Three Rivers, Pomme de Terre, Grand Cote, and Spring Bayou.[24] Lake Ophelia and the Lake Long tract, however, remained unprotected. Both the State of Louisiana and the U.S. Fish and Wildlife Service had made purchase offers, but they were rejected.[25] "We thought we were going to get it but everything fell through,"[26] said a U.S. wildlife agent. "The next thing we knew the bulldozers moved in."[27]

There was more money to be made in planting beans.

II. AN UNUSUAL MARRIAGE

Washington, D.C., 1971–1972. Meanwhile, a thousand miles away, a power play was erupting in the nation's capital over what was happening to wetlands across America. One side wanted to regulate their development under the new and still ill-defined Clean Water Act of 1972. The other side did not want it regulated at all.

By the early 1970's, the U.S. Army Corps of Engineers (Corps) had exercised exclusive jurisdiction over the nation's waters for 150 years, and was thoroughly committed by statute, training, and worldview to development.[28] The Environmental Protection Agency (EPA), newly minted, had little experience in wetlands or anything else, and an enormously ambitious charge to clean up the nation's air and water. And so, in 1972, Congress coupled an agency exclusively directed to protect the environment

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the Singer tract in 1943, shortly before a tree containing nest and eggs came down. GEORGE HINES LOWERY, LOUISIANA BIRDS 415-16 (1955).

[24] Area Surrounding Marksville, LA, GOOGLE MAPS, http://maps.google.com/maps (search "Marksville, LA"; then zoom out to 50%).

[25] Dupuy Oct. Interview, *supra* note 2.

[26] *Id.*

[27] *Id.* (quoting Mike Dawson of the real estate office of the U.S. Department of Fish and Wildlife).

[28] For a history of the Corps and its emerging regulatory functions, see Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 504-09 (1977).

with a partner to whom the environment was something that got in the way. That they would quarrel and, truth be told, not like each other very much was understandable, even inevitable. The question, which would erupt at every bend in the road, was who called the shots. *Avoyelles Sportsmen's League* presented this question in capital letters.

The Corps was no stranger to regulating activities in and around water. By historical accident, it had morphed from a small military command clearing snags from rivers to an elephantine department with over 22,000 civilian employees engaged in a wide range of dam building, levee raising, canal dredging, pump drainage and other projects that, often by design, eliminated the wetland base of the country for navigation, agriculture, energy, real estate development, and similar pursuits.[29] If Corps intervention made money for someone, it became their job.[30]

Buried in the Corps's authority, however, was a second mission it inherited in the 1890s to protect these same waterways from the discharge of wastes and "refuse."[31] Which meant most obviously things that would impede navigation. And continued to mean that until a pair of Supreme Court decisions in the 1960s shocked American industry by finding that its pollution discharges (in these cases, metal tailings and spilled oil) were "refuse" within the meaning of the law.[32] Justice William O.

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[29] *See* U.S. ARMY CORPS OF ENG'RS, CIVIL WORKS PROGRAM-SPECIFIC AGENCY RECOVERY ACT PLANS 3 (2010), *available at* http://www.usace.army.mil/Portals/2/docs/recovery/ARRAUSACEAgencyPlanAug2010.pdf (noting that there are 22,600 civilian employees at the Civil Works Program). Perhaps the most trenchant history of this development, its politics, and its conflicts with the environment is contained in a series of articles by Michael Grunwald in the Washington Post. *See, e.g.*, Michael Grunwald, *An Agency of Unchecked Clout*, WASH. POST, Sept. 10, 2000, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051201550.html.

[30] *See* 33 U.S.C. § 701(a) (2006) (providing for Corps action wherever "the benefits, to whomsoever they may accrue, are in excess of the estimated costs").

[31] Rivers and Harbors Appropriation Act, 33 U.S.C. § 403 (2006) (obstructions); *Id.* § 407 (refuse). This Act expanded on earlier jurisdiction conferred in the Act of September 19, 1890, ch. 907, 26 Stat. 426.

[32] United States v. Standard Oil Co., 384 U.S. 224, 230 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 489-91 (1960). For a review of these cases and their consequences, see Oliver A. Houck, *The Water, the Trees and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279 (1996); and William C. Steffin, Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782 (1971).

Douglas, adverting to the "crisis that we face" in water pollution, found the term "refuse" to be "comprehensive," and that was the "common sense of the matter."[33] It was a new day. Pollution was suddenly the subject of federal prohibition. Under a statute that, to a near certainty, did not have pollution in its sights when it was written some seventy years before. The law evolves.

At this same evolutionary moment, the Corps was responding to heavy pressure from the U.S. Department of the Interior (Interior), the closest thing to a federal environmental agency at the time, to implement fish and wildlife laws by jointly consulting on its activities,[34] leading in turn to a new Corps process of "public interest review" that included consideration of the surrounding environment.[35] Shortly thereafter, in 1970, this commitment was put to the test in Florida, where the Corps, quite unexpectedly, denied a real estate developer named Zabell permission to fill a sizeable chunk of Boca Ciega Bay.[36] There was no claimed impediment to navigation; rather, the development, in conjunction with similar projects, would have unacceptable impacts on fisheries and water quality. Zabell could not believe the denial and sued, his brief arguing for the rights of private property over "the love life of little fishes."[37] The denial was upheld by a federal appellate court which declared that "[the Corps] was entitled, if not required, to consider ecological factors" quite apart from

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[33] *See Standard Oil*, 384 U.S. at 225, 229-30.

[34] *See* Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-67 (2006) (requiring "equal consideration" of fish and wildlife values and Corps consultation with the Department of the Interior in water resources development); Memorandum of Agreement Between the Secretary of the Interior and the Secretary of the Army from July 13, 1967, 33 Fed. Reg. 18,670, 18,672-73 (Dec. 18, 1968); *see also* WANT, *supra* note 12, at 2-6 to 2-10; Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 700-05 (1989).

[35] *See* 33 C.F.R. § 320.4(a) (1986).

[36] Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). According to Lester Edelman, who was counsel to the House of Representatives Committee on Public Works at the time, *see infra* text accompanying note 227, he suggested that the Corps rely on the newly-enacted National Environmental Policy Act, 43 U.S.C. § 4321 (2006), for its denial—which it did. Telephone Interview with Lester Edelman (Oct. 3, 2011).

[37] *See* CRAIG PITTMAN & MATTHEW WAITE, PAVING PARADISE: FLORIDA'S VANISHING WETLANDS AND THE FAILURE OF NO NET LOSS 23 (2009) (describing the *Zabel* case and its appeal).

navigation,[38] cracking open a very large door. The Corps was now at least one-toe-in-the-water into regulating the environmental impacts of dredge and fill projects.

Meanwhile, the recent Supreme Court decisions were making the Corps's life untenable. Overnight, it was tasked with issuing discharge permits for thousands of industries about whose processes and impacts it did not have the faintest idea.[39] Young federal prosecutors and fledgling environmental lawyers began filing lawsuits against these industries for unpermitted discharges.[40] Scrambling to catch up, President Nixon devised a two-part permit system under Corps authority, but based on water quality impacts as determined by near equally-untrained personnel from Interior.[41] It was an obvious stop-gap measure, but it planted the seed of dual-agency management.

At which point, Congress had to act. The existing water pollution control program was in chaos, rivers smelled bad, some were catching fire, Lake Erie was pronounced dead, one Florida lake recorded a die-off of twenty-five million fish, and these phenomena were out in plain view.[42] Congress acted boldly, replacing a state-based laissez-faire approach with a remarkably strong program led by the EPA, which would set pollution discharge standards, issue permits based on them, and enforce them in court.[43] Leaders of both parties placed the legislation on a high moral plane: Senator Howard Baker (R-Tenn.), stating that if we could not enjoy our water resources "what other comforts can life offer us?"; was matched by his colleague Edmund Muskie (D-

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[38] *See Zabel*, 430 F.2d at 201.

[39] *See* Houck, *supra* note 32 at 2289-91; William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 811-19 (1971).

[40] Rodgers, *supra* note 39, at 792-93. Inter alia, some 400 criminal indictments were issued in the following four years. *Id.* at 792.

[41] Power, *supra* note 28, at 512; Steffin, *supra* note 32, at 788. Adding to the confusion, the Corps's permit program was soon invalidated by a federal district court. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).

[42] *See* PITTMAN & WAITE, *supra* note 37, at 18 (listing additional examples, including twenty-six million dead fish at Lake Thonotosassa); Houck, *supra* note 32, at 2,280 n.6, 2,286 n.34 (Lake Erie, the Cuyahoga River, etc.).

[43] Originally enacted as the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, the statute has been renamed the Clean Water Act, 33 U.S.C. §§ 1251-74 (2006).

Me.) "Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself?"[44]

The bill passed the Senate unanimously. When President Nixon, at a peak of popularity that would result in his landslide reelection a few months hence, signed a veto instead, the Senate overrode him 52-12, the House by 247-23.[45] Such was the strength of the Clean Water Act of 1972.

With one hitch. While all members of Congress recognized the urgency of pollution control, they broke ranks over who should control one piece of the problem, dredge and fill activities that were the main game of the Army Corps of Engineers and the grits and grease of development in the American South.[46] The two Corps dredges plying the lower Mississippi River were named after the two senior members of the Louisiana delegation, Allan Ellender and Russell Long.[47] To Senators Baker and Muskie, it made sense to consolidate all water permitting in a single agency, and one dedicated to cleaning up the environment.[48] To House Public Works Committee members, however, the EPA could pose a huge threat to the status quo ante and, besides, they pointed out, the Corps was already regulating dredge and fill.[49] Months of argument changed no minds (the same argument persists today) and, facing the failure of the entire bill, § 404 finally emerged as a compromise.[50] It is an extraordinary pas-de-deux which empowered the Corps to issue the permits (round one for the House),[51] but under guidelines developed by the EPA (this round

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[44] *See* PITTMAN AND WAITE, *supra* note 37, at 25; 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 1, 93d Cong., 1st Sess. 164 (1973) (Senator Muskie).

[45] *See* PITTMAN & WAITE, *supra* note 37, at 25.

[46] *Id.* at 35-36; WANT, *supra* note 12, at 2-7.

[47] Telephone Interview with William Fontenot, Former Exec. Dir., La. Wildlife Fed'n (Aug. 22, 2011) (Mr. Fontenot was a former executive director of the Louisiana Wildlife Federation and subsequently served in the Louisiana Office of the Attorney General until his retirement.).

[48] *See* Power, *supra* note 28, at 523. The discussion of the enactment that follows is taken primarily from these sources.

[49] *See* Rivers and Harbors Appropriation Act, 33 U.S.C. §§ 403, 407 (2006).

[50] 33 U.S.C. § 1344 (2006).

[51] 33 U.S.C. § 1344(a).

for the Senate),[52] which could also veto disposal sites if the impacts were sufficiently severe.[53]

Few expected warm camaraderie from such an arrangement. Both sides felt, however, that they'd made the best of a bad deal. The best hope was for a creative "pluralism" that would arrive at moderate outcomes.[54] This hope would soon be put to the test.

III. A GOOD DEAL ON BEANS

Avoyelles Parish, Louisiana 1960–1980. The issue was soybeans, which in the 1960s were riding a global bubble.[55] Catching the wave, the U.S. Department of Agriculture developed a program to stimulate bean production by converting what it referred to as "trash lands"—agriculture-speak for parts of the environment not dedicated to crops or farm animals.[56] More than any other ecosystem, it targeted bottomland hardwood wetlands.

Agriculture had always been particularly unkind to wetlands, which for most of history were considered a nuisance and the very antithesis of productivity. George Washington himself, surveying the Great Dismal Swamp of Virginia, declared it a "glorious paradise," and then joined a land venture to drain it with slaves for farms.[57] The great bulk of the country's (dramatic) wetland losses over the past century were to inland, freshwater systems.[58] Some ninety percent of these went to agricultural development,[59] aided and abetted by flood control and drainage structures of the Army Corps of Engineers. A 1987 study by economists of the Environmental Defense Fund concluded that twenty-five percent of all bottomland conversion along the lower Mississippi was due "exclusively" to federal projects, chiefly those of the Corps.[60]

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[52] 33 U.S.C. § 1344(b).

[53] 33 U.S.C. § 1344(c).

[54] *See* 1 U.S. SENATE, COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250 (1973).

[55] Telephone Interview with Richard Ludington, *supra* note 18.

[56] *Id.*

[57] PITTMAN & WAITE, *supra* note 37, at 7.

[58] WANT, *supra* note 12, at 2-4 (citing OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION (1984)); Osborne, *supra* note 4, at 3 (summary report at 7).

[59] WANT, *supra* note 12, at 2-4 (citing U.S. GEN. ACCOUNTING OFFICE, *supra* note 12, at 2, 20).

[60] *See* STAVINS, *supra* note 11, at xv.

Which, of course, was the agency now responsible for § 404 permitting under the Clean Water Act. Presenting a rather stark conflict of allegiance.

The Department of Agriculture's soybean initiative was either brilliant or egregious, depending on where you stood. From a development standpoint it was a no-lose proposition. The Department created "land banks" that made government loans to land purchasers at $200 per acre, no money down.[61] In Louisiana, the lands available were marginal for row crops, flooding about every two or three years.[62] Given the federal subsidies, however, this fact of nature did not change the economics a great deal. The buyer would cut down the commercial timber and sell it, which might pay off half of his loan. That first year he would bulldoze, level, and drain the land, and even throw out a crop of beans to seed. The second year he would harvest a crop, making at least another hundred dollars an acre, usually more. If for some reason the market fell, the government would buy up his crops instead. If, over time, repeated high water made farming untenable he would look to unload it. But at that point the sale was all profit.

Osborne would write of the scheme:

> No welfare recipient standing in line waiting for food stamps would dare claim that he was just participating in the free enterprise system. But with corporations receiving millions in federal benefits and subsidies, the universal claim seems to be that the decision to convert hardwood bottomlands is a free market decision. Welfare recipients don't complain when they find out that there are strings attached to their food stamps— they can't buy whiskey or auto parts with them. But the corporation whose property was swamp, under water for most of the time before

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[61] The description that follows of the Department of Agriculture initiative and the economics of soybean production are taken largely from interviews with Richard Ludington and William Fontenot. Telephone Interview with Richard Ludington, *supra* note 18; Telephone Interview with William Fontenot, *supra* note 47. The Louisiana Land Bank's website states, "Not only can we finance that farm or ranch land you've been wanting, we can help you fund improvements for your existing property. We offer loans for clearing or leveling land; improving pastureland, irrigation systems, water wells and fences . . . ." *Loan Products*, LOUISIANA LAND BANK, http://www.louisianalandbank.com/loans.htm (last visited Apr. 21, 2012). The program, apparently, continues.

[62] Telephone Interview with Richard Ludington, *supra* note 18.

> government money, complains bitterly when he finds out there's such a thing as wetland regulation. Then they call the industry lobbyist. It's not a partnership of God and farmer; it's a partnership of government subsidy and agribusiness.[63]

There was yet more money on the table. The soybean ventures were also fueled by major insurance companies . . . Travelers, Prudential, Aetna . . . who saw a sure-fire place to park premium payments, making fortunes for entrepreneurs from Louisiana upriver to southern Illinois.[64] The purchaser of the Lake Long tract, a Frenchman named Albert Prevot, had nothing against bottomland hardwoods or the hunting community in his neck of the woods. It was simply that the government was giving away soybean money, and the insurance companies would back the rest. A self-professed "wheeler-dealer" (which he pronounced "willer-diller"), Prevot apparently did not have much respect for the law; according to Dupuy, "he did what the hell he wanted to," which would bring him real trouble in the end.[65]

For all of their power, however, soybeans were not the only trump card in *Avoyelles*. Practically everyone living there fished and hunted, and looked forward to it year-round. The private landscape was divvied up among hunting clubs, and while their leases were usually "brother-in-law" affairs, a public bid for a bottomland hardwoods lease at the time ran to $26.87 per acre, for a single season.[66] Nearly in sight of the Lake Long property sat the Grand Lake Hunting Club, whose members included several "big shots" of the Parish, and a young attorney named Don Wilson

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[63] Osborne, *supra* note 4, at 4.

[64] Telephone Interview with Richard Ludington, *supra* note 18; Telephone Interview with William Fontenot, *supra* note 47. Mr. Fontenot worked for the Louisiana Office of the Attorney General in the 1970s and was asked to investigate land clearing on the Lake Long tract. *See infra* text accompanying note 124.

[65] According to Donald Wilson, Prevot referred to himself as a "wheeler and dealer," which he pronounced "willer and diller," to Wilson's amusement. Telephone Interview by Endre Szalay with Donald Wilson, Attorney at Law, Landowners Abstract & Title (May 24, 2011). Wilson represented the Avoyelles Sportsmen's League in the coming litigation. Dupuy Oct. Interview, *supra* note 2. According to Dupuy, Joe Elder picked up the Long tract for $10 per acre and was looking for a buyer; Prevot made the purchase at about $100 per acre. *Id.*

[66] Osborne, *supra* note 4, at 2.

who would go on to lead the Avoyelles Sportsmen's League.[67] They were taken by surprise.

Albert Prevot's land clearing split the community. He had bought the property only recently,[68] but private property rights in this region ranked at the right hand of God.[69] This was Prevot's land, period; you wanted to save bottomland hardwoods then buy them. This happened to be Mark Dupuy's point of view, and he in fact, as a former state wildlife commissioner had devoted considerable energy to purchasing game management areas.[70] Many in the hunting community, however, saw more to it than that. Only ten years earlier the State had bought the highly-prized Spring Bayou Wildlife Management Area, with excellent bottomland habitat and considered top-of-the-line for bass fishing.[71] As the soybean operations came on, the area degraded steadily from erosion and other pollution.[72] The hunting turned poor, the bass disappeared. Per one news report there was "nothing left but a mud hole."[73]

It was not just the mud. The runoff was hard-core. A sampling of fish in the East Franklin-Bonnet Idee watershed showed seventy-five percent of its fish contaminated by agricultural chemicals.[74] Lake Providence in East Carroll Parrish, a major body of water, was closed due to high levels of toxaphene, a carcinogenic row-crop pesticide.[75] Whereupon Louisiana's Commissioner of Agriculture, Gil Dozier, reassured the press that there was "no problem for public health" so long as fishing was banned.[76] There would be no help from this quarter.

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[67] Telephone Interview by Endre Szalay with Donald Wilson, Attorney at Law, Landowners Abstract & Title (Dec. 14, 2010).

[68] Schultz, *supra* note 1, at A-1; Dupuy Oct. Interview, *supra* note 2.

[69] This perspective dominated even the State Office of Forestry. *See* Sam Hanna, *The Wetlands Controversy*, FORESTS & PEOPLE 11 (1980). The article begins with the quote "Where have our freedoms of ownership gone?" *Id.* at 9.

[70] Dupuy Oct. Interview, *supra* note 2.

[71] Adras LaBorde, *Public Versus Private Interest: I*, ALEXANDRIA DAILY TOWN TALK, Aug. 27, 1978 (on file with Author); Telephone Interview with Donald Wilson, *supra* note 67.

[72] L. L. Gremillion, *The Boiling Point*, WKLY. NEWS, Aug. 17, 1978, at 2.

[73] LaBorde, *supra* note 71.

[74] Osborne, *supra* note 4, at 2.

[75] *Dozier Supports Sacrificing Lake to Use Pesticide*, MORNING ADVOC., May 25, 1979, at B-1.

[76] *Id.*

As Wilson and his friends saw it, were the Lake Long tract cleared and put into beans, the same fate would await nearby Grassy Lake. The damage to Spring Bayou had been irreparable. Here it was time to draw the line. Locals who had never protested a thing in their lives began to post signs along the road to the Lake Long tract that read, "Stop the Dozers."[77] One man who helped post them told a newspaper reporter, "They're raping the country; that's what it amounts to."[78]

This, in one of the most conservative precincts in America.

IV. THE MARRIAGE IMPLODES

Washington, D.C., 1973–1977. During this same time Congress's hopes for a cooperative wetlands program were dashed almost immediately over a basic issue: how far it would reach. To the Corps, the answer was simple: the act said that it reached what was "navigable" and the Corps had been interpreting that term for over a century to mean below the mean high water line and mean high tide.[79] Even the Boca Ciega Bay case, stretching Corps authority, took place in a body of water that floated boats. To the EPA, however, the Clean Water Act required more; in fact it defined navigable as including all "waters of the United States."[80] House of Representatives leaders like John Dingle, Jr. (D-Mich.) had stated that "no longer [were] the old, narrow definitions of navigability . . . going to govern,"[81] while a Senate report explained that it extended the concept of navigability because water "moves in hydrological cycles and it is essential that the discharge of pollutants be controlled at the source."[82] It all seemed rather obvious. Pollution ran downstream. The great

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[77] Schultz, *supra* note 1, at A-4.

[78] *Id.*

[79] *See* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (Corps definition).

[80] *See* OFFICE OF THE GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, MEANING OF THE TERM "NAVIGABLE WATERS," 1973 WL 21937 (1973).

[81] 118 CONG. REC. 33,756-77 (daily ed. Oct. 4, 1972) (statement of Rep. Dingle). His remarks were supported by the Conference Report intending that "navigable waters" be given "the broadest possible interpretation," "unencumbered" by prior policies. S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.). This language, too, would reappear in the *Avoyelles* litigation.

[82] S. REP. NO. 92-414, at 77 (1971).

majority of the nation's waters were inland and upland, and the Corps approach left them unprotected from assault.

The Department of Interior, and later attorneys from the Department of Justice (DOJ), weighed in on the EPA's side, to no avail.[83] The Corps—out of fear of the unknown perhaps, or a historic affinity with development interests, or simply an unwillingness to accede to its new EPA partner—was sticking with what it knew.[84] These same gut instincts would resurface in the *Avoyelles* litigation.

By retaining the word "navigability" in the statute, however "redefined," Congress had left an apparent loophole. Which would not stay unfilled for long. In an ad hoc fashion, the EPA led the counterattack with a pair of enforcement actions expanding federal jurisdiction under the Act.[85] The first was the prosecution of an oil spill into a tiny creek in Kentucky, obviously not navigable, leading to a holding that the law reached upstream to the middle of the country.[86] Shortly thereafter, the same EPA attorney teamed up with a federal prosecutor in Florida to challenge a wetland development above the line of mean high tide.[87] The trial judge, whose pro-development ruling in the Boca Ciega case had been overturned on appeal, may have had that in mind in ruling for the government this time, holding that pollutants had been discharged into "waters of the United States" and that "the mean high water mark cannot be used to create a barrier behind which such activities can be excused."[88] Goodbye, navigation test. Greatly pleased by the opinion, the EPA administrator wrote his clean water partner, the chief of engineers, to urge that he follow it.[89] The Corps would have none of it. It was time for Plan B.

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[83] *See infra* note 85.

[84] *See* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. at 12,115 (Corps rationale).

[85] Telephone Interview with Vance Hughes, Attorney, Envtl. Prot. Agency (May 18, 2011). Mr. Hughes, an attorney in EPA's Region IV Office of Counsel, participated in the cases that follow. *See also* PITTMAN & WAITE, *supra* note 37, at 36-37.

[86] United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326-28 (6th Cir. 1974).

[87] United States v. Holland, 373 F. Supp. 665, 667, 670-76 (M.D. Fla. 1974).

[88] *Id.* at 675-76.

[89] PITTMAN & WAITE, *supra* note 37, at 37.

In disputes between federal agencies, Plan B often looks to outside parties to vindicate a point of view. We have, it is said, a "unitary government," which means that one agency of government does not sue another. If the EPA had a beef with the Corps's interpretation of law, it would have to go elsewhere. In this case, without official imprimatur, it went to the Natural Resources Defense Council (NRDC) in Washington, D.C., a budding and soon to be premiere environmental law firm that specialized in EPA regulatory programs.[90] NRDC attorneys, schooled by EPA lawyers who had handled the earlier cases,[91] and backed up by National Wildlife Federation attorneys who had the lobbying power of that organization behind them,[92] should the case make waves, brought a lawsuit against Secretary of the Army Howard Callaway, challenging the Corps's narrow interpretation of § 404.[93]

It was an unusual case, because the Department of Justice is charged with defending federal agencies, which means that if an agency has a plausible argument then the DOJ will advance it to the court.[94] Its representation becomes more problematic when other agencies have different, legitimate interpretations, which was the case here with the EPA and the Interior. At which point the DOJ had to decide between them. In their case, the DOJ not only sided with the EPA but wrote the Corps a letter saying so and giving its reasons.[95] Which later ended up, of all places, as an attachment to the NRDC complaint.[96] At the trial, the Corps's argument was made not by DOJ, but by counsel to the secretary of the army, another unusual sight, but it seemed to make little

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[90] *About Us*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/about/ (last visited Apr. 22, 2012).

[91] *Id.* at 36; Telephone Interview with Vance Hughes, *supra* note 85.

[92] The author was general counsel to the National Wildlife Federation during this time.

[93] Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

[94] Telephone Interview with James W. Moorman, Former Assistant Attorney Gen., Dep't of Justice (May 17, 2011) (Mr. Moorman headed the Environment and Natural Resources Division of the U.S. Department of Justice during this time.).

[95] WANT, *supra* note 12, at 2-9 n.44 (citing Complaint, Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (No. 74-1242)).

[96] *Id.*

difference in the end.[97] The case went before a no-nonsense judge in the District of Columbia who, in a curt opinion, overruled the Corps's regulation and directed the agency to expand its coverage in accordance with the law.[98] "The easiest lawsuit I ever won," the NRDC attorney later reflected.[99]

The Corps was shocked. This proud and powerful agency, as confident and immutable in its domain as the Atomic Energy Commission at the time, historically beyond the touch of courts and even the executive branch,[100] was already reeling from early lawsuits under the National Environmental Policy Act[101] and, now, from the explosion of its water resources jurisdiction into places and issues it was loathe to go, in its view a "backdoor land use planning" of America.[102] Within days of the opinion, a Corps Civil Works general and the public relations office issued one of the most imprudent federal press releases in modern times.[103] Under the misguided *Callaway* opinion, went the statement, federal permission would be required for "the rancher who wants to enlarge his stock pond," "the farmer who wants to deepen an irrigation ditch or plow a field," or "the mountaineer who wants to

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[97] The Corps was represented by Brian O'Neill from its Office of Counsel; Mr. O'Neill is better known for his subsequent representation of the plaintiffs in the Exxon Valdez oil spill litigation. E-mail from Brian B. O'Neill, Partner, Faegre Baker Daniels, to author (May 20, 2011, 10:17 CST) (on file with author); *see* DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME (1997). During this litigation, the Corps complained about the representation of its position by DOJ counsel. WANT, *supra* note 12, at 2-9 n.44 (citing Letter from Charles D. Ablard, Gen. Counsel, Corps of Eng'rs, to Wallace H. Johnson, Assistant Attorney Gen., Dep't of Justice (Mar. 25, 1975)).

[98] *Callaway*, 392 F. Supp. at 686.

[99] PITTMAN & WAITE, *supra* note 37, at 40.

[100] Oliver Houck, *New Roles for the Old Dam Builder?*, NAT'L WILDLIFE, Aug.-Sept. 1975, at 13 ("President Truman . . . was strong enough to fire General Douglas MacArthur but, so far, the Army Engineers have successfully defied him . . . . No more lawless or irresponsible Federal group than the Corps of Engineers has ever attempted to operate in the United States, either outside of or within the law." (quoting U.S. Interior Secretary Harold L. Ickes in 1951)).

[101] *See* Envtl. Def. Fund, Inc. v. Hoffman, 421 F. Supp. 1083, 1088-89 (E.D. Ark. 1976) (Cache River project); Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 324 F. Supp. 878, 881-82 (D.D.C. 1971) (Cross-Florida barge canal). Both projects were eventually cancelled.

[102] PITTMAN & WAITE, *supra* note 37, at 37.

[103] Press Release, Dep't of the Army, Office of Chief of Eng'rs (May 6, 1975) (on file with author).

protect his land against stream erosion."[104] Indeed, housewives who cast wash water out of the back door might be implicated. The U.S. Department of Agriculture chimed in by characterizing the new reach of the program as including anything "that is capable of floating a two-by-ten inch plank after a rainstorm."[105] Although lamely defended by Corps personnel as an attempt to clarify the situation,[106] the agency was sending a clear signal to its development constituencies and Congress: Change the law.[107]

The next two years were § 404 of the Clean Water Act's moment of truth. Everything about the program was on the table, from its geographic jurisdiction to its management standards, its managing agency, and the continued existence of the program at all.[108] The lobbying in Congress was fierce, and it fell upon members who had voted a few years earlier for a feel-good pollution control bill but had little idea about the details, less yet about dredging and filling wetlands. EPA pollution permits might number in the hundreds for industrial plants . . . well and good . . . but, § 404 would eventually reach private landowners, farmers, timber companies, highways, marinas, shopping malls, real estate developers, virtually anyone who did anything in any place wet, some 10,000 individual permit applications a year.[109] The South, as could be expected, led the blowback, Congressman Jim Wright, Jr. (D-Tex.) of Texas accusing § 404 of the kinds of "abuses leading

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[104] *Id.*

[105] *Agriculture Urges Legislative Action Limiting Scope of Corps Regulations*, [Current Developments] Env't Rep. (BNA) 643, 644 (1975).

[106] Jeffrey K. Stine, *Regulating Wetlands in the 1970s: U.S. Army Corps of Engineers and the Environmental Organizations*, 27 J. FOREST HIST. 60, 67-70 (1983).

[107] Not all in the Corps felt this way. Some Corps and army counsel worked to resist an appeal of the opinion and to implement it against the coming backfire. Email from Brian B. O'Neill to Oliver A. Houck, *supra* note 97. For Mr. O'Neill's participation in the *Callaway* case, see *supra* note 97.

[108] The Corps, insisting that the cost and manpower would be overwhelming, prepared a thirteen-volume set of proposed changes to the regulations, involving "navigable waters concept, land use planning, phasing, general permitting, state versus Corps jurisdiction, state delegation, and . . . agricultural activities." *EPA Subcommittee on Dredge and Fill Hears Overview of Regs at First Meeting*, [Current Developments] Env't Rep. (BNA) 1963 (1976). For a full description of the two-year legislative battle, see Lee Evan Caplin, *Is Congress Protecting Our Water? The Controversy over Section 404, Federal Water Pollution Control Amendments of 1972*, 31 U. MIAMI L. REV. 445 (1977).

[109] PITTMAN & WAITE, *supra* note 37, at 41 (11,000 applications).

to the . . . Magna Carta."[110] His Senate colleague, John Tower (R-Tex.), greeted committee staffers suspected of favoring the *Callaway* opinion with the question, "OK, Jim, what is a wetland and why the hell should I care? Is that all that mud down in south Texas that they been trying to get rid of since I was a boy?"[111]

By another coincidence, "Jim" was Jim Range, who had prosecuted Clean Water Act jurisdiction cases in Florida with EPA attorneys and was now the Senate staff attorney charged with drafting the new bill and, less officially charged by Senator Baker with keeping § 404 together.[112] For a full year the action stalled, the parties were too far apart, the House insisting, as it had a few years earlier in the enactment process, on returning jurisdiction to mean high water and to the safe hands of the Army Engineers.[113] The Senate, for its part, with a more ecological goal in mind, wanted to keep the expansive jurisdiction and eliminate the Engineers.

After a second year of debate and compromise, both sides won something but the Senate largely prevailed. The Act's expanded jurisdiction remained unchanged. As did the tenuous Corps-EPA partnership based on permits, guidelines, and veto.[114] Exceptions were made for those farmers, timber operators, and stockowners made famous by the Corps's flaming press release; they would be granted exemptions for normal practices that did not include putting more wetlands into crops or pasture.[115] This exception, too, would be put to the test in the *Avoyelles* litigation.

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[110] Caplin, *supra* note 108, at 460-66 (describing Wright's bill that reduced § 404 to navigable waters and exclusive Corps jurisdiction, and passed the House in June 1976).

[111] PITTMAN & WAITE, *supra* note 37, at 29.

[112] *Id.*

[113] Caplin, *supra* note 108, at 480-89.

[114] *See supra* notes 49-51.

[115] 33 U.S.C. § 1344(f) (2006). General permits could be issued for minor actions, and a state could even take over a program if it wanted the responsibility, and the heat, for this kind of decision-making. To date, only Michigan and New Jersey have opted to do so. *Michigan*, ASS'N OF STATE WETLAND MANAGERS (Aug. 8, 2005), http://www.aswm.org/state-summaries/771-michigan; *New Jersey*, ASS'N OF STATE WETLAND MANAGERS (Nov. 12, 2004), http://www.aswm.org/state-summaries/779-new-jersey. The heat is hot, and the rewards are small. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-87 (1995).

While this drama was playing out, the Corps was obliged by the *Callaway* decision to issue new regulations on the scope of its jurisdiction which ultimately sent the § 404 program far upstream, to tributaries of navigable waters, to all waters that led in any fashion to navigable waters, and to their associated wetlands.[116] This is where the *Avoyelles* case came in. The Lake Long tract bordered Bayou Jeansonne in the Bayou Natchitoches basin. Importantly, this is *when* the *Avoyelles* case came in . . . in the wake of a bruising, multi-year battle between the Corps and the EPA with the wounds hardly sutured and by no means healed.

V. THE GATHERING

Avoyelles Parish, Louisiana, 1977–1978. Avoyelles Sportsmen's League (League) arose from several sources, but the first was the League itself. Ironically, there had been a previous Avoyelles Sportsmen's League, led by coincidence by Marc Dupuy, but it soon ran its course.[117] When the Prevot clearing began, Don Wilson, just a few years out of Louisiana State University Law School, reclaimed the name for those who wanted to take more affirmative action.[118] He was backed at every turn by Lyle Gremillion, a fellow member of the Grand Lake Hunting Club who was also a reporter with *The Weekly News*, and by a felicitous coincidence, the son of its owner and publisher.[119]

Gremillion went on the warpath in August 1977 with an editorial called "The Boiling Point."[120] Declaring it time to stop this "crime against nature," it challenged the readers with: "IS IT THAT YOU DON'T KNOW OR IS IT LIKE THE PRICE OF EGGS IN CHINA; YOU JUST DON'T GIVE A HANG!"[121] The beat rolled on, fed by letters such as one from the board of directors of the League that began, "Keep boiling!" and continued:

> This clearing of land is going on all over Avoyelles Parish. So we will have to move quickly, or before we know it, our

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[116] WANT, *supra* note 12, at 2-9, 2-10. Jurisdiction was extended in two phases, ending in 1977. *Id.*

[117] Dupuy Oct. Interview, *supra* note 2.

[118] Telephone Interview with Donald Wilson, *supra* note 65.

[119] *Id.*

[120] Gremillion, *supra* note 72, at 2.

[121] *Id.*

> streams will be trickles of poisoned water, sans ducks, sans fish, and all other aquatic life, and our squirrels, our deer, and all other wildlife will be lying DEAD ON BARE GROUND, with nobody but the alligators to mourn their passing.[122]

The board, in the heat of the moment, might be forgiven for its allusion to the alligators, which would of course be among the first to go. In a bit of foreshadowing, though, the letter concluded: "We need to . . . get the FEDERAL ENVIRONMENTAL PROTECTION AGENCY, and the ARMY CORPS OF ENGINEERS in here!! IT IS TIME FOR THE FREE STATE OF AVOYELLES TO JOIN THE UNION!!!!!!"[123] This, from one of the last parts of the South to cede to the Union.

The League did not turn immediately to law. In August 1977, with the bulldozers rolling and a third of the Lake Long tract already leveled and burning, it sent a delegation to meet with the state attorney general, who sent some representatives up to look at the operation but would not pull the trigger.[124] It is not certain he saw a trigger. The delegation included Avoyelles state representative Raymond Laborde, but he was in a no-win position; he could side with the money or the hunters.[125] Both voted. Wilson describes politics in the region as tough, "but in Avoyelles Parish it was a blood sport."[126]

When it did turn to the law, the League's first thoughts were in the Louisiana Civil Code, more particularly a well-known provision stating that, although a landowner may do whatever he pleases with his estate, "still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."[127] This is a heightened form of the common law action of nuisance. In fact, just such a nuisance action had been brought against some large soybean operations that drained into the Saline Larto Complex,

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[122] Letter from Rhea & Aubrey N. (Bob) Aden, Bd. of Dirs., Avoyelles Sportsman's League, to L. L. Gremillion, Reporter, Wkly. News (Aug. 18, 1978) (on file with author).

[123] *Id.*

[124] Telephone Interview with William Fontenot, *supra* note 47; Telephone Interview with Donald Wilson, *supra* note 65.

[125] Telephone Interview with Donald Wilson, *supra* note 67.

[126] *Id.*

[127] LA. CIV. CODE ANN. art. 667 (1996).

yet another state management area north of Spring Bayou.[128] Once again, the land clearing and farm runoff were highly destructive to Saline Larto, but here local hunters secured a state court injunction requiring the farmers to manage their pollution.[129] The lawsuit had come too late to save the hardwood bottomlands, but still, it was something. In fact, it was all Don Wilson and the Avoyelles Sportsmen's League could think of.

There were, however, two other lawyers about to appear, each with litigating experience under the Clean Water Act and its most controversial provision, § 404. The first was James T.B. Tripp of the Environmental Defense Fund in New York City, who had a few years before helped stop a Corps dredging project on the Cache River in Arkansas, with a boost from a newly-invigorated EPA regional office in Dallas.[130] This lawsuit and another against the Tennessee Tombigbee Waterway in Alabama[131] opened Tripp's eyes to this largely secret ecosystem, bottomland hardwoods, so fast disappearing from the American landscape.[132] Tripp had started out as a federal prosecutor in southern New York bringing Refuse Act cases against industrial dischargers, the front edge of environmental law at the time.[133] An unusual combination of litigator and intellectual, he had an appetite for working long hours and a passion for science that became almost mandatory as the *Avoyelles* case came on.[134] At which point he was calling the hardwood bottomlands "the soul of the South." When he got a call from Don Wilson about the Lake Long tract clearing he thought, if we are going to save this ecosystem, this is the place.

Osborne was the other attorney, at that time representing the National Wildlife Federation from a field office in New Orleans focused on wetland loss, and he was an entirely different

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[128] Telephone Interview with Donald Wilson, *supra* note 67.

[129] *Id.*

[130] *See* Envtl. Def. Fund, Inc. v. Hoffman, 421 F. Supp. 1083 (E.D. Ark. 1976).

[131] Envtl. Def. Fund, Inc. v. Alexander, 467 F. Supp. 885 (N.D. Miss. 1979).

[132] Telephone Interview by Endre Szalay with James T.B. Tripp, Gen. Counsel, Envtl. Def. Fund (May 27, 2009) (Mr. Tripp is currently General Counsel to the Environmental Defense Fund in New York City.). The biographical information that follows is taken from this interview.

[133] *James T.B. Tripp*, ENVTL. DEF. FUND, http://www.edf.org/people/james-tb-tripp (last visited Apr. 21, 2012).

[134] The biographical information of Mr. Osborne that follows is taken from personal conversations with the author during the 1970s.

human being.[135] Born and raised in Louisiana, he spoke with an easy accent and a kind of time delay between question and answer that took the edge off of even difficult conversations. He spoke simply, as seen with his description of the people of the Lake Long region that opened this article, and with examples, even parables. His background was in the daily grind of private civil law, a practice that found him representing all manner of people on all manner of difficulties; oil rig workers, discharged employees, and his skill was in relating to them and relating them to judges and juries. Although not a hunter, Osborne took to the outdoors at every opportunity and his idea of the good life was a campfire, by a river, with a strong cigar. The cigar could drive his colleagues crazy.

The Avoyelles landowners were represented by local counsel including Marc Dupuy and Joseph LeBlanc of a major firm in New Orleans. As the case heated up, Walter Conrad from a Houston firm joined the team and effectively took the lead. Conrad was an accomplished lawyer, but he would stumble over the culture and witnesses as the litigation proceeded.[136] As in many federal cases, the government was first defended by the local U.S. attorney, but its brief would soon be assumed by Fred Disheroon of the Department of Justice. Disheroon had served as counsel to the Corps in the first days of its wetlands enforcement actions and now faced the unusually difficult task of reconciling two clients,[137] the Corps and the EPA, who had become quite un-reconciled in Washington. As might be imagined, they had two very different views of the case.

From the Cache River lawsuit and yet another in south Louisiana in which, of all coincidences, Conrad was also on the other side, both Tripp and Osborne were aware of the power of §

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[135] Telephone Interview with Donald Wilson, *supra* note 67; *see infra* note 282 and accompanying text.

[136] E-mail from Fred Disheroon, Special Litigation Counsel, U.S. Dep't of Justice, to Oliver A. Houck, Professor of Law, Tulane Univ. Law Sch. (May 19, 2011, 13:04 CST) (on file with author); Telephone Interview with Fred Disheroon, Special Litigation Counsel, U.S. Dep't of Justice (May 5, 2011). He also faced the challenge of understanding the local witnesses whose Cajun accents left the Washington lawyers, and there were many from the agencies, scratching their heads and murmuring, "what'd he say?" Telephone Interview with Fred Disheroon, *supra.*

[137] S. La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980).

404 of the Clean Water Act.[138] It was Tripp's idea to make *Avoyelles* a § 404 case. Don Wilson, who had re-created the Avoyelles Sportsmen's League and considered suing under Louisiana law, recalls "not knowing we even had a Clean Water Act," much less anything about the torturous journey of its wetland protection provisions.[139] Nor did the presiding judge, who turned out to be the biggest surprise of the proceedings.

VI. A TEMPORARY RESTRAINING ORDER

Rapides Parish, Louisiana, August 1978. The plaintiffs were in a box. Throughout the summer, bulldozers had been knocking down trees and leveling the Lake Long tract for beans. Nearly half of the bottomland hardwoods were gone, and the rest were falling fast. Which militated for requesting a temporary restraining order (TRO) from the federal court, except that this extraordinary remedy was also a risk. Ostensibly issued on the basis of whether a party would be irreversibly injured before a hearing on the merits could take place, in reality and inevitably TRO's were the judge's first opinion of a case and, as in many walks of life, first opinions become final opinions. The difficulty that the Avoyelles Sportsmen's League and the other plaintiffs faced was that the judge would be ruling without evidence, without witnesses to present the horror-show they were seeing and the manner in which the § 404 legal violations arose. It would be all hearsay and word of mouth. Adding to the difficulty was that this provision of the Clean Water Act remained relatively new and completely untried in this part of Louisiana. They would have to educate the judge in very short order, without detailed memoranda, on the fly. A TRO request vested enormous faith in the judge.

In this case, without tactical planning or premeditation (the federal court in Alexandria was the only one with jurisdiction over the matter), they landed on one of the most extraordinary judges of his place and time, Nauman S. Scott of the Western District of Louisiana. Judge Scott had been born to the profession, his father was an attorney, his grandfather a state senator, and his great uncle had served as Chief Justice of the Louisiana Supreme Court

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[138] Telephone Interview with Donald Wilson, *supra* note 65.

[139] *Id.*

in the early 1920s.[140] His reputation (or infamy, in some circles) did not rest on this lineage, however, but instead on his role in the Herculean task of desegregating one of the most unreconstructed parts of the American South, which is of course saying a great deal. Brother to the Ku Klux Clan, the somewhat less violent White League came out of north Louisiana,[141] as did Louisiana governors and congressmen dedicated to the suppression of civil rights for black Americans.[142] The aggression in this region against blacks and their allies in the white community equaled that anywhere,[143] and the attitude was if anything exacerbated by the Supreme Court's 1954 integration decision in *Brown v. Board of Education*. It took courage for federal magistrates to order the desegregation of public facilities in Louisiana, and federal judges John Minor Wisdom and J. Skelly Wright of New Orleans are, today, widely recognized for having led the way. New Orleans, however, in the 1960s was a relatively urbane environment.

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[140] *See* TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862-1877, at 1-2 (1992) (describing slaughter of blacks and white Republicans in north Louisiana, giving rise to The White League, which a few years later would go on to rout and kill primarily black federal forces in New Orleans at the Battle of Liberty Square); *see also* William Gillette et al., *The Longest Battle: Intervention in Louisiana*, *in* RECONSTRUCTING LOUISIANA (Lawrence N. Powell ed., 2001).

[141] Louisiana Governor Murphy Foster, 1892-1900, born and raised in north Louisiana, fought to maintain white supremacy in the state by adopting the Louisiana Constitution of 1898, which sought to disenfranchise blacks. Foster was also a supporter of the Louisiana Bourbonist movement, which opposed reconstruction. *See* WILLIAM IVY HAIR, BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900, at 23, 234-35 (1969). Foster's grandson, Murphy J. Foster, Jr., was elected to the same office in 1996, a campaign later marred by revelations that he paid well-above market rates for mailing lists for candidate David Duke, grand wizard of the Ku Klux Klan, in return for which Duke stepped out of the race. *Murphy J. Foster, Jr.*, NNDB.COM, http://www.nndb.com/people/379/000120019 (last visited Apr. 2, 2012); *see also* CHARLES S. BULLOCK III, DAVID DUKE AND THE POLITICS OF RACE IN THE SOUTH 20 (John C. Kuzenski et al. eds., 1995). One of Foster, Jr.'s first official acts was to rescind an order requiring affirmative action in state employment. *See* Exec. Order No. MJF 96-3 (Feb. 14, 1996), *available at* http://www.doa.la.gov/osr/reg/mar96/9603_001.pdf. Adding to the aroma, David Duke had been an active candidate in the previous gubernatorial election and garnered an overwhelming majority of votes in north Louisiana. *See* BULLOCK, *supra*, at 66.

[142] *See generally* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

[143] *See* CARL L. BANKSTON III & STEPHEN J. CALDAS, A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA 38 (2002).

Consider what it would take for a judge to do likewise in rural Louisiana 150 miles to the north. Virtually alone.

Judge Scott did. A local black minister brought the first school desegregation case in Rapides Parish back in 1961, at a time when the majority of black school children lived below the poverty line and their schools were disasters.[144] Fifteen years following *Brown v. Board*, the *Rapides* facilities were still starkly divided between black and white, prompting Scott to revive the lawsuit and order a massive, cross-parish bussing plan.[145] An all-white elementary school was closed, only to be opened again by defiant parents until Scott had them evicted by federal marshals.[146] Meanwhile, another battle was raging over bussing white high school students to a just-integrated black school in Alexandria.[147] Here, parents gerrymandered the integration order by transferring custody of their children to relatives in another district, approved by state Judge Richard E. Lee. Scott reversed the approval, calling it a sham. Lee then ordered state troopers to escort the white students to a white school.[148] When Scott rescinded the order, Lee himself escorted the students, at which Scott threatened contempt of court and fines of $500 per day.[149] Lee supporters brandished bumper stickers reading, LEE IS HOT—SCOTT IS NOT. A congressman from Georgia filed an impeachment resolution against Scott, who did not give an inch, and the resolution slowly died.[150] This, then, was the judge who would preside over the first environmental case in north Louisiana, *Avoyelles Sportsmen's League.*

In November of the year, a TRO hearing was held in Judge Scott's chambers, which were barely large enough to accommodate his law clerk and the dozen or so attorneys involved even at that

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[144] *Id.* at 166.

[145] *Id.* at 167.

[146] *Id.*

[147] *Id.* at 167-68.

[148] *Two Judge Clash Again in Louisiana School Dispute*, N.Y. TIMES, Jan. 3, 1981, *available at* http://www.nytimes.com/1981/01/03/us/around-the-nation-two-judges-clash-again-in-louisiana-school-dispute.html.

[149] *Id.*

[150] *See* A Resolution to Impeach Nauman Scott, Judge of the United States Disctrict Court for the Western District of Louisiana, H.R. Res. 61, 97th Cong. (1981) (sponsored by Rep. McDonald).

early point in the case.[151] Only Tripp was absent, away on other business. Osborne remembers being the last one to enter the room, scrambling to pull documents from his briefcase.[152] The judge looked around the room and spied him, one of the few unfamiliar faces, and asked, "Mr. Osborne, you are from New Orleans are you not?"[153] Osborne feared the worst because the cachet of New Orleans did not travel well in this neck of the woods, but instead Scott said, as if talking to a visiting colleague:

> Let me tell you that there is a nice rooming house down the road run by a lady who is a friend of mine, and we at the courthouse normally take lunch at a diner by the railroad tracks, and there is a cleaners across the way that can press your clothes daily.[154]

There was something earthy about Osborne that Scott sensed, perhaps a shade of Cherokee blood from ancestors in Oklahoma, but for whatever reason, as Don Wilson later recalled, "there was an instant rapport."[155]

Osborne had done his homework. He'd spent the previous three days with Don Wilson up on the Lake Long tract, taking notes and photographs of the clearing operations and filling him in on the Clean Water Act.[156] He had two advantages over everyone else in Judge Scott's chambers: physical evidence of the operation (the photos were brutal) and a working familiarity with § 404 that made him an authority in the room. In his accent tinged with the South, Osborne started with the facts, as you would with a jury, and then moved to the law, what it was for, how it worked, why it applied here. According to Wilson, "Mike flat charmed his britches off."[157]

The Corps and the landowners, meanwhile, rather than take the position that the Lake Long tract, bone dry that year, was not a wetland and therefore not subject to § 404 regulation at all,

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151 Telephone Interview with Donald Wilson, *supra* note 67.

152 Telephone Interview with Michael Osborne, Director, Southern Wetlands Project (May 11, 2011).

153 *Id.*

154 *Id.*

155 Telephone Interview with Donald Wilson, *supra* note 67.

156 *Id.*

157 *Id.*

argued instead that the land clearing did not constitute the discharge of dredge or fill material; they were just moving trees around. If any dirt got moved in the process it was "de minimis." The argument did not play well. Don Wilson noted:

> [Judge Scott] got tired of them telling him over and over, "Judge, this is not a dredge and fill activity," and he finally told them, "Bullshit, yes it is, you're moving dirt around, you're using bulldozers, you're leveling land, that's filling." [T]hey would say, "It's only de minimis," and he said "That's bullshit too, it's not de minimis, I can tell you I've seen bulldozers, I know what bulldozers do, you guys are moving dirt around, that's a fill activity, that's dredge and fill."[158]

The Prevot lawyers, for their part, also argued that this was private property and landowners could do what they wanted with it,[159] which cut no more ice with the court. If that position prevailed, Osborne observed, there would be no pollution control laws at all.[160]

Scott issued the restraining order. Prevot was permitted to continue operations on land he had already cleared but was enjoined from clearing any more for the next sixty days.[161] He and the Corps were shocked. The League and environmental groups had bought the time necessary to prove their case on the merits. They had also won the all-important first round. Tripp, learning of the order, also remembers being "stunned, impressed and surprised."[162] According to Wilson, Osborne won the whole lawsuit that day.[163] After that, they just "filled in the blanks" and "crossed the i's and dotted the t's."[164] That of course is a local trial lawyer speaking, reading a judge he came to know very well. But some complex and precedent-setting issues would follow, and they are where Tripp came in.

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158 *Id.*

159 *Id.*

160 *Id.*

161 *See* Avoyelles Sportsmen's League v. Alexander (*ASL I*), 473 F. Supp. 525, 536 (W.D. La. 1979).

162 Telephone Interview with James T.B. Tripp, *supra* note 132.

163 Telephone Interview with Donald Wilson, *supra* note 67.

164 *Id.*

VII. *AVOYELLES SPORTSMEN'S LEAGUE (ASL I)*

Alexandria courthouse, Rapides Parish, Spring 1978. The Corps, to its credit, had not been stonewalling the complaints of the League completely. In late July it had sent out notices that the clearing activities across Avoyelles Parish might require a Clean Water Act permit, particularly building levees and excavating drainage ditches . . . classic "dredge" and "fill."[165] These were activities the Corps knew well; it conducted them routinely in its own projects. The purpose of the notice was simply to make the public aware. Neither Prevot, nor anyone else apparently, applied for a permit.

Nothing more was done until, about a month later, responding to continuing complaints about the Prevot clearing, the Corps ordered the landowner to "cease and desist" until it could determine what activities were covered and how much of the tract was wetland.[166] Corps personnel then walked the tract with Prevot and, shrugging off the protests of the Fish and Wildlife Service,[167] allowed him to go back to work on all but the wettest portions of the property. The work, however, even on those wettest portions, would not require a permit unless, per the earlier notice, it involved levees or ditches.[168] The bulldozing of the bottomland hardwoods, of course, was neither. It was at this point that Wilson had called Tripp and started the litigation.

The Corps's position, then, raised two very distinct issues, the first of which was whether what Lake Long tract bulldozers were doing was the deposit of "dredge" or "fill" within the meaning of § 404,[169] and the second of which was whether these wet-again, dry-again hardwood bottomlands were covered by § 404 at all.

In January 1978, the TRO expiring, the plaintiffs sought to continue the injunction in a preliminary hearing before Judge Scott. Tripp, participating this time, recalls that he had "no idea

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[165] *See supra* note 161 and accompanying text.

[166] Telephone Interview by Endre Szalay with Dale Hall, CEO, Ducks Unlimited (Dec. 20, 2010). Hall, a new biologist with the Service at the time, went on to become Director of the agency from 2005 to 2009.

[167] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 901 (5th Cir. 1983).

[168] 33 U.S.C. § 1344(a) (2006).

[169] Telephone Interview with James T.B. Tripp, *supra* note 132.

where Scott was coming from, but that Mike and Don seemed to have a better sense."[170] Again to his surprise, the judge required Prevot to apply for a permit for levees or ditches on land he had already cleared and continued the injunction over additional clearing on the *entire* tract.[171] He ordered further, given the confusion over how much of the tract was wetland, the government to make a final wetland determination within the next two months.[172] Meanwhile, the case would go to trial on the activity question, whether Prevot's bulldozers were discharging dredge or fill within the meaning of federal water law.

This part of the case was something of a lay-down. Judge Scott had already tipped his feelings about what bulldozing was and did. Photographs secured by the U.S. Fish and Wildlife Service,[173] which was making a stand for bottomland hardwoods of its own at Lake Long, were indisputable and convincing. Scott's analysis, however, went deep, beginning with the clearing process:

> Initially, bulldozers outfitted with shearing blades cut the timber and vegetation at or just above ground level. The shearing blades were v-shaped, had a serrated edge and flat bottom and were approximately 18–20 feet in length. . . . Although the blades were adjusted to ride on the ground's surface, they did scrape the leaf litter and humus that overlaid the soil as they moved from tree to tree.
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> . . .
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> After the shearing, windrowing and chunk raking the land was disced to prepare it for soybean cultivation. A disc is a bowl-shaped blade that cuts into the ground and fluffs the soil up. The disc's [*sic*] used on this tract were 24 inches in diameter and would cut into the ground approximately 9 inches. During discing, some soil would ride in front of the disc and would be redeposited in other areas of the tract,

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[170] *Id.*

[171] *Id.*

[172] Telephone Interview with Dale Hall, *supra* note 166; Telephone Interview with James T.B. Tripp, *supra* note 132.

[173] Avoyelles Sportsman's League v. Alexander (*ASL I*), 473 F. Supp. 525, 528 n.5 (W.D. La. 1979).

> resulting in substantial displacement and redepositing of the soil itself.[174]

The landowner had also dug a classic drainage ditch across the property and had at least four or five miles of similar ditches to go.[175] These were, after all, lands that took some degree of water every spring.

This said, the court did not restrict its conclusions to Prevot's ditches. In turning the operation loose following its temporary cease and desist order, the Corps had formally determined that "[p]lowing, discing, and raking of the sort observed on the tract so far will not require a permit."[176] That determination would not stand. In Scott's view, as he had just described, the entire operation dredged up and discharged soil; it also partially filled the sloughs on the property, many of the smaller ones entirely, which became fill activity as well. This determination, he said, followed both "the spirit as well as the letter of the law."[177] A basic function of the Clean Water Act was to protect the important functions wetlands serve, including erosion control, pollution reduction, flood storage, and the causa bellae of this case, fish and wildlife; the Act would be "emasculated" were he to conclude that the "permanent removal . . . of the wetland's vegetation" for agricultural use was not subject to § 404.[178]

The defendants had one last string to their bow. It remained to determine, they argued, that these kinds of activities had been pardoned when Congress amended § 404 only the previous year.[179] While the Corps's regulations prevailing at the time exempted "plowing, seeding, harvesting, [and] cultivation" without qualification,[180] Judge Scott found the exception overly broad as

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[174] *Id.* at 528-29.

[175] *Id.* at 529.

[176] *Id.* (citing the Corps's wetland determination that followed the cease-and-desist order); *see* Telephone Interview with Donald Wilson, *supra* note 65.

[177] *ASL I*, 473 F. Supp. at 532.

[178] *Id.* at 534; *see also* 33 U.S.C. § 1344(f) (2006).

[179] *Id.* at 535 (citing 33 U.S.C. § 1344(f)(1)(A) (2006)).

[180] Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,130 (July 19, 1977) (The preface of the 1977 Corps regulations implementing the § 404 permit program states that "activities such as plowing, seeding, harvesting, [and] cultivating . . . do not involve discharge of dredged or fill material."); *see also ASL I*, 473 F. Supp. at 535.

applied to what he saw happening on the Lake Long tract. Congress had spoken of "normal" farming and silvicultural activities, and these were neither.[181] Walter Conrad, for the landowners, called an expert witness with a long background in agriculture and forestry to testify that normal silviculture included clear-cutting of "climax" (old) trees, and that replacing them with different tree species or even with soy did not make it less so when it eventually returned to forest.[182] Judge Scott was skeptical: "soybeans are trees?" he asked.[183]

Tripp picked up on the opening. He remembers his first question on cross-examination as: "In your opinion, if someone is cutting down the forest with no intention of replacing it or returning it back to forest, is that normal silviculture?"[184] The question was risky, because Tripp did not know what the answer would be, but it came back concise and unambiguous, "No."[185] At that point, he can remember thinking, "we were light years ahead."[186] Judge Scott quickly dismissed the other half of the "normal" agriculture/silviculture argument by pointing out that the § 404 exemption, in its very words, did not apply to activities bringing more wetlands into production.[187] Case closed, but for one anomaly: an amicus brief filed by the National Forest Products Association, the Forest Products Association, and the Louisiana Forestry Association which took the position that the wholesale eradication of bottomland hardwoods, the dominant forest type of this part of the world, was not restricted by the Clean Water Act.[188] One might have thought these groups favored trees.

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[181] 33 U.S.C. § 1344(f) (2006) (emphasis added) (stating that activities such as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are exempted from regulation under the Clean Water Act); *see also ASL I*, 473 F. Supp. at 535-36.

[182] Telephone Interview with Donald Wilson, *supra* note 65.

[183] *Id.*

[184] Telephone Interview with James T.B. Tripp, *supra* note 132. All quotations from the trial that follow in this article are taken from interviews with the participants, as cited.

[185] *Id.*

[186] *Id.*

[187] 33 U.S.C. § 1344(f)(2) (2006); *see also ASL I*, 473 F. Supp. at 535.

[188] *ASL I*, 473 F. Supp. at 530.

VIII. *AVOYELLES SPORTSMEN'S LEAGUE (ASL II)*

Alexandria courthouse, Rapides Parish, Louisiana 1979. Tripp would later say that joining the EPA with the Corps as defendants in the *Avoyelles* case was the smartest thing he did.[189] It required the government's attorney, Fred Disheroon, to present both sides of the legal issues, because there was very little on which the EPA and the Corps agreed. Ultimately, it would force the Department of Justice to make a very controversial call as to which position it would present in court as that of the United States. In the meantime, and following, the government's laundry would be aired in Judge Scott's courtroom in Alexandria, Louisiana. Tripp et al.'s challenge was to persuade the court that virtually all of the Lake Long tract was a § 404 wetland.

As we know, at the very start of the controversy the Corps had concluded that only a third of the property was under Clean Water Act jurisdiction; the rest Prevot was cleared to move on, without permit, as he wished. The Corps based its position on regulations adopted in 1975, and their conservative application by a wetland scientist with impeccable credentials, which included his Ph.D. thesis on the bottomland hardwood ecosystem.[190] The 1975 regulations limited § 404 to types of vegetation that "require[d] saturated soil" for "growth and reproduction."[191] Very few tree types fell into this category, primarily the cypress and tupelo gum emblematic of deep swamp environments that were wet virtually year-round.[192] As with its insistence on limiting the Act's meaning of "navigable waters," the Corps was trying to get itself out of what it considered the "land use business."[193]

In 1977, following the *Callaway* decision sending the Corps's jurisdiction upstream, the Corps, in collaboration with the EPA this time, revised its regulations in significant ways.[194] It dropped the word "required" in favor of "adapted for life in saturated soil

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189 Telephone Interview with James T.B. Tripp, *supra* note 132.

190 *Id.*

191 Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975); *see also* Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 289 (W.D. La. 1981).

192 *ASL II*, 511 F. Supp. at 289.

193 Telephone Interview with Lester Edelman, *supra* note 36.

194 33 U.S.C. § 1362(8) (2006); 33 C.F.R. § 323.2 (2006); *see also ASL II*, 511 F. Supp. at 285-86.

conditions," which would apply to many more tree types up the chain towards high and dry terrain.[195] Judge Scott had no trouble appreciating the difference. The Corps's position in the Lake Long litigation not only ignored the language of their revision, but also gave "no consideration for the goals and purposes of the Act."[196] Scott was no more impressed by a semantic argument which would seem comical were it not so lethal to bottomland hardwoods; the government urged that he read "adapted for life" to mean that each tree type needed saturation for the entirety of its life, in effect returning to the status quo of 1975.[197] Scott saw through this maneuver as well, and went one farther to flip the presumption: trees were wetland species if they were "tolerant" of saturation, excluding only the high ground, intolerant species.[198] How did he travel this far?

One explanation is that he, as had Tripp before, fell into the science of the issue and pursued it all the way. Whatever the reason, Tripp, Osborne, Wilson, Depuy, Disheroon, the EPA, the Corps, and the Interior participants all describe the proceedings that followed as a seminar in the science of hardwood bottomlands. No fewer than fourteen experts testified on the "wetlands" issue, three for the private landowners, five for the government defendants, and six for the environmental plaintiffs.[199] They included the tops of their fields. Judge Scott had begun to take their testimony at the first trial, but it soon became apparent that the government witnesses were in great disagreement. This was the point at which he recessed this line of testimony and ordered Disheroon to prepare a "final wetland determination" that reflected a consolidated government position.[200] No small task.

Two months later Disheroon reappeared with a document that, in effect, found eighty percent of the Lake Long tract to be a wetland.[201] It had been another head-busting exercise in

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[195] 33 C.F.R. § 323.2(c); *see also ASL II*, 511 F. Supp. at 289.

[196] *ASL II*, 511 F. Supp. at 289.

[197] *Id.*

[198] *Id.* at 291.

[199] Telephone Interview with James T.B. Tripp, *supra* note 132.

[200] *ASL II*, 511 F. Supp. at 281.

[201] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 903 (5th Cir. 1983).

Washington, D.C., only six years after the battle in Congress over § 404 jurisdiction in 1971–1972, then the *Callaway* furor of 1975–1976, and then the § 404 amendments of 1975–1977. There are allegations in a landowner's brief that the struggle this time included back-room browbeating of the Corps by the Office of Management and Budget and other, off-camera, political actors.[202] It may well have taken place, it is hard to imagine it *not* taking place with parties so often opposed to the mere idea of each other, but here we were with Corps versus EPA all over again and, when the smoke went up, the EPA had prevailed. Writ large. Disheroon and the Department of Justice not only concluded that the eighty percent figure supported by the EPA was scientifically and legally correct, but also and more dramatically, that it was within the EPA's purview to make such calls.[203]

In briefs to the Justice Department, Tripp and his team of scientists had supported a higher figure; the Department of Interior took the position that even the ridges on the tract, given their soils and hydrology, were wetlands, putting it all under § 404.[204] Disheroon had been so impressed by a few of Tripp's experts that he asked permission to borrow them to prepare the government's determination, which was of course gladly granted.[205] Even here, politics would play its part. One government expert, a soil scientist at Louisiana State University, later told Tripp that if he had gone any higher he'd have had difficulties back at the office.[206]

Now Tripp and Osborne had a tactical decision to make, whether to challenge a government determination that was quite favorable to them, or to accept and defend it. Disheroon at an earlier stage had offered Tripp et al. any arrangement they could confect to make this particular case, which came at such an unpropitious time, go away.[207] They declined. As Don Wilson recalled, "I couldn't go back home to that land clearing, they'd kill

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[202] Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[203] *ASL III*, 715 F.2d at 903; Telephone Interview with Fred Disheroon, *supra* note 136.

[204] Telephone Interview with James T.B. Tripp, *supra* note 132.

[205] *Id.*

[206] Telephone Interview with Donald Wilson, *supra* note 67.

[207] *Id.*

me."[208] Now, the formal wetland determination delivered to the Alexandria courthouse, Prevot et al. were ready to challenge it in fact and law. Tripp et al. would support the determination with testimony that, if anything, it was under-inclusive. *Avoyelles II* was under way.

The proceedings lasted two weeks. Tripp recalls his cross-examination of the landowner's chief expert, the Corps consultant who had made the first thirty-five percent call.[209] Dr. Rhodes was perhaps the premier bottomland hardwood scholar in the country, and his doctoral thesis was a tour de force description of tree species in this terrain rising from deep swamp to high and well-drained soils. Tripp had taken the time to study it and understand that what it also described were the adaptations these particular trees made to live in an environment so capriciously wet and dry. On cross-examination ("the best I think I've ever done," he recalls), he walked Rhodes through each species, each modified root, rhizome, bark, seed, and reproduction mechanism that had evolved to in some cases require, and in all cases tolerate, periodically wet soils. It took a long time, the better part of a morning, the other attorneys dozing off as in classes in Biology 101. Towards the end, Tripp reached for the payload. "In fact Dr. Rhodes," he asked, "if these trees could not tolerate periods of saturation they couldn't live there, isn't that correct?" Yes, it was correct, indeed obvious. "And they had adapted themselves accordingly, wasn't that the point of your thesis?" Yes, again. Bang, the trap snapped shut. Rhodes had just put the entire Lake Long tract vegetative community within the "adapted for life" language of the Corps's wetland regulations.

Tripp's own witnesses included a young wildlife biologist from the U.S. Fish and Wildlife Service,[210] Dale Hall, who would go on to direct the agency some twenty years later. Hall recalls his

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[208] Telephone Interview with James T.B. Tripp, *supra* note 132. The description of this examination is based on this source, but corroborated by Wilson. *See* Telephone Interview with Donald Wilson, *supra* note 65; *see also* Telephone Interview with Harless Benthul, Office of Reg'l Counsel, Region VI, Environmental Protection Agency (May 22, 2011) (According to Benthul, an observer at the trial, Tripp's style was to proceed methodically and in great detail, and then bring it all together.).

[209] Telephone Interview with Dale Hall, *supra* note 166.

[210] *Id.*; *see also* Telephone Interview with James T.B. Tripp, *supra* note 132; Telephone Interview with Donald Wilson, *supra* note 65.

first testimony, after which Conrad began his cross-examination with "Dr. Hall, your background is in . . ."—at which point Dale interrupted. "Well sir," he said, "I don't have a Ph.D., so I'm not a doctor, just a mister." Conrad smiled and mouthed to himself, "just a mister." Hall looked up at Judge Scott and found him grinning encouragingly from ear to ear. He felt a bit uneasy nonetheless, "the government was not supposed to help sue the government," but he was doing fisheries studies on hardwood bottomlands in the Atchafalaya Basin to the south, and continued them up on the Lake Long tract.

Hall made several contributions to the case, the first of which was detailed photo images of the property and un-cleared property nearby;[211] the contrasts were perhaps unnecessary for Judge Scott, but they were dramatic. He also conducted studies of adjacent sloughs and bayous affected by bottomland clearing, and found that the operations, even offsite, reduced fish populations by some ninety-five percent.[212] Perhaps most valuable was his collection of fish samples and fish skeletons way up on the tract, on even the ridges. It was like having live victims in the room. They were displayed at the plaintiffs' end of the table throughout the proceedings.[213]

It was Don Wilson's lay witnesses, however, that seemed to capture the soul of Judge Scott, and provided the highlights of the several proceedings. Donald "Nookie" and Raymond "Cookie" Laborde lived up in Brouillette, a tiny community bordering the Lake Long tract, and while Nookie worked for a phone company Cookie had no job to speak of.[214] Wilson called them to testify that the water in nearby Lake Long was clear, and there were ducks up on the property, which would be a fair indicator for wetlands. Strong rumor had it that these were the two biggest outlaws in all of Avoyelles Parish, "spotlighted deer at night, killed and skinned alligators." Wilson asked Nookie if he hunted up on the Lake Long

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[211] Telephone Interview with Dale Hall, *supra* note 166.

[212] *Id.*

[213] *Id.*

[214] *See* Bruce Shultz, *Witness Says More Clearing Will Increase Basin Siltation*, MORNING ADVOC., Apr. 24, 1979; Telephone Interview with Donald Wilson, *supra* note 65. The description of the examination of the Laborde witnesses that follows is taken primarily from Wilson, although corroborated by cited interviews with Tripp and Hall. The Labordes apparently used their nicknames during the proceedings. *Id.*

tract, trying to establish his general knowledge of the area. There was silence in the courtroom "for about sixty seconds," Nookie looking around nervously at the assembled lawyers and government authorities. Finally he asked, slowly, "*when*?"—reluctant to admit, in Wilson's words—"that he was shooting things out there twelve months a year." "In season," his attorney added quickly, to which a relieved Nookie said, "oh yeah, when it's the season." Judge Scott smiled broadly.[215]

Nookie also testified that they knew the place well because they planted a grain crop of milo up on a ridge.[216] Wilson could see the defense counsel smiling behind him: "See? This was dry land." Wilson asked whether they made a good crop. "Pretty good crop," Nookie said. "Did they get the crop in?" Wilson asked. "Oh no," said Nookie, "but it worked out really well because when the water came up to the bottom of the grain the cows swam out and ate it off." Which sounded rather wet after all. Judge Scott could not keep from laughing.

Wilson had also queried Cookie Laborde about the ducks. "There were ducks," he said. Conrad rose to cross-examine, and asked him first to look at a map and point out where he lived.[217] "I can't read no maps," Cookie said. Conrad bore in, "Well just look over here and just tell me where you live," and Cookie said again, "I don' read no maps." Judge Scott had had enough. He looked down and said, "Mr. Conrad, the witness has told you he can't read maps. Move on." Conrad might have gotten the message.

Instead, as Tripp recalled it, Conrad went at it with Cookie Laborde for three and one half hours. It was like watching someone losing money at the casino and doubling his bets. Cookie, under pressure, described the Lake Long terrain with hand gestures that proved eloquent and a sincerity that could not be

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[215] The poaching problem, to which the Labordes doubtlessly contributed, was a sore point with state wildlife officials and perhaps contributed to their reluctance to weigh in on the *Avoyelles* controversy. *See* Tommy Couvillion, WKLY. NEWS, Mar. 9, 1972, at B1, 2 (describing problem).

[216] Telephone Interview with Donald Wilson, *supra* note 65 (Wilson's examination that follows is taken from this source, corroborated by Tripp.).

[217] Telephone Interview with James T.B. Tripp, *supra* note 132 (The Conrad examination is taken from this source.).

shaken.[218] Towards the end, Conrad came back to the ducks. They'd said there were ducks up there, but exactly how many ducks would that be? Cookie was silent. Then he said, slowly, "plenna ducks." Which seemed definitive. At last, Conrad went for his closer: would Cookie (or any other sane person) say he lived in a *wetland*? Cookie was silent again, and the courtroom suddenly alert. "Waal," he replied, "I guess you could say so."

Cookie Laborde had just summed up ten days of scientific testimony in *Avoyelles II*.

In March 1981, the delay reflecting the novelty and complexity of the case, Judge Scott issued his ruling on the wetlands issue. He found the evidence to show no substantial disagreement among the various experts that "*all* of the [plant] species which appear in prevalence on the Lake Long tract are tolerant species."[219] As they also appeared in a "wetland environment of soils and hydrology," the entire tract, with the exception of two circumscribed ridgelines, was "therefore wetlands."[220] A permit to clear them would be required. He appended a detailed map.[221]

The ruling was a surprise to all sides. It went beyond the eighty percent figure proposed in the government's final wetlands determination, to something more like ninety percent. This was of course the position favored by the Department of Interior, and consistent with Tripp et al.'s witnesses, most of whose assessments reached into the ninety-plus percents.[222] Judge Scott had in effect made his own wetland determination, which would present a sore point on appeal.

Meanwhile, land clearing on the Lake Long tract went into a prolonged hold.

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[218] Cookie Laborde also testified that, on the dredge and fill issue, he saw a backhoe on the Prevot property digging a large hole, "the logs they wouldn't burn they would bury with a backhoe." Shultz, *supra* note 214.

[219] Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 291 (W.D. La. 1981) (emphasis added).

[220] *Id.*

[221] *Id.* at 293.

[222] Telephone Interview with James T.B. Tripp, *supra* note 132.

IX. THE CIVILETTI OPINION

Washington D.C., 1979. The Corps was furious. It had felt itself underrepresented in the *Avoyelles* case from the outset, first by an assistant U.S. attorney with no familiarity with the § 404 program, and then by Disheroon from the DOJ who seemed to be siding not only with the plaintiffs but, worse, with its bete-noire, the EPA. At one point in *Avoyelles I*, with confusion reigning over the government's position, Judge Scott asked Disheroon his own position on the matter.[223] As Disheroon recalls it, he no sooner began to reply than an attorney whom he cannot recall called out, "He's testifying! Put him under oath!" This, Judge Scott proceeded to do, but as Disheroon again began to state his position, which did not favor that taken by the Corps, the Vicksburg district's district engineer, combat medals on his uniform jacket, shouted from a front row seat in the audience, "[h]e's lying!" Such were the passions at play.

They were if anything heightened in Washington, and heightened again by the required final wetlands determination which had been jerry-rigged, as the Corps may have seen it by Disheroon at DOJ after some back-room maneuvering.[224] Deciding to elevate the problem, the Corps's Chief Counsel Lester Edelman arranged a meeting with Disheroon's boss, James Moorman, who directed the Lands and Natural Resources Division at the DOJ.[225] According to Moorman, who does not mince words, Edelman came in on a tear, "pissed that Justice was siding with EPA."[226] Edelman had considerable experience in the game. He had been counsel to the House Public Works Committee, which had never favored the EPA, during the bruising § 404 legislative battles, and

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[223] Telephone Interview with Fred Disheroon, *supra* note 136 (The description of the events following is taken from this interview.).

[224] Certainly the landowners whom the Corps was supporting felt this way. *See* Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[225] Interview with James R. Moorman, Former Assistant Attorney Gen., Dep't of Justice, in Washington D.C. (May 17, 2011). Formerly known as the Lands Division, it has since been renamed the Environment and Natural Resources Division. *Id.* The description of the meeting with Mr. Edelman and the approach to the Attorney General is taken from this source. *Id.*

[226] *Id.*

had formed his own view on what was enacted and why.[227] As could also be recalled, the House position did not prevail . . . yet another wound.

Moorman was both deeply green and deeply rational. He was the first executive director of The Sierra Club Legal Defense Fund,[228] and brought a pioneering environmental lawsuit against the Trans Alaska Pipeline.[229] He had authored a memorandum detailing obstacles and opportunities in environmental law that became an early Bible in the field.[230] He was very much a lawyer, and, while his instincts told him that the Corps had the weaker argument ("the Corps didn't want the jurisdiction and they didn't want anyone else to have it either"), he saw Edelman's protest as a no-win proposition; whichever agency he favored would cause continuing trouble down the line. Musing aloud, he asked Edelman, why not seek an opinion of the attorney general?

He had opened a side door. Attorney general opinions are written by the Office of Legal Counsel, a unique office within the DOJ that serves as an independent advisor to DOJ and other agencies on request.[231] While the Office of Legal Counsel seeks the views of all affected parties, including DOJ attorneys, it is functionally separate from any of its front-line divisions. The analyses it prepares are its own, and the resulting opinions, although not binding law, are widely respected and cited as such. It could provide the perfect cover here; no one would take the hit.

Moorman recalls that he saw a light go on in Edelman's mind. Corps counsel, doubtless, were under great pressure from the Corps's brass and saw this as a way to get a free second

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[227] *Lester Edelman*, DAWSON & ASSOCS., www.dawsonassociates.com/ourteam/edelman.html (last visited Apr. 22, 2012); *see also* Email from Lester Edelman, Senior Counsel/Senior Advocate, Dawson & Assocs., to author (Aug. 29, 2011, 2:14 CST) (on file with author). Among other disagreements, he viewed the EPA's exercise of § 404 authority over individual Corps permits to be ultra vires. *Id.*

[228] Since renamed the EarthJustice Legal Defense Fund. *See Our History*, EARTHJUSTICE, http://earthjustice.org/about/our_history (last visited Apr. 22, 2012).

[229] Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973). The pipeline case led to an injunction under National Environmental Policy Act, 42 U.S.C. § 4321 (2006), opening the courthouse door to a wave of similar lawsuits.

[230] James W. Moorman, *Primer for the Practice of Environmental Law*, 1 ENVTL. L. REP. 5001 (1971).

[231] *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/olc (last visited Apr. 22, 2012).

opinion. Edelman agreed.[232] The secretary of the army would request a written opinion of the U.S. attorney general. He would ask two questions: As between the Corps and the EPA, which agency had the ultimate authority to determine the reach of "navigability" under § 404, and which to interpret its agricultural exemptions?[233] In effect, the Corps was appealing *Avoyelles Sportsmen's League*.

Moorman felt confident that the opinion would be based on the merits.[234] The newly appointed Attorney General, Benjamin Civiletti, was grounded in general practice and seemed interested in environmental issues; in fact, he had wanted to head the Environment and Natural Resources Division himself.[235] He was not likely to bend to political pressure from the Corps or Capitol Hill.

As it turned out, from the Corps's point of view, Civiletti ruled the wrong way on both issues. It is not a lengthy memorandum. It cites little precedent. Instead, it reasons from the structure of the overall Clean Water Act which is explicitly conferred on the EPA, and which contains several programs, including the all-important National Pollution Discharge Elimination Program, which depend entirely on EPA interpretation and administration.[236] Nothing in the statute contemplated that "a water body would have one set of boundaries for purposes of dredge and fill permits" and "a different set for purposes of the other pollution control measures."[237] Waters for one had to be waters for all, and since the EPA had the call on most activities in most waters, that was where the call lay. Almost

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[232] In retrospect, Edelman considers acquiescing in an attorney general's opinion to have been a mistake; he would have had a better chance with the Office of Management and Budget. Telephone Interview with Lester Edelman, *supra* note 36. If the landowner's brief earlier cited is correct, however, OMB was also on EPA's side. *See* Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[233] Admin. Auth. to Construe § 404 of the Fed. Water Pollution Control Act, 43 Op. Att'y Gen. 197 (1979) [hereinafter Civiletti Memorandum].

[234] Telephone Interview with James W. Moorman, *supra* note 94.

[235] *Id.*

[236] Civiletti Memorandum, *supra* note 233, at 220.

[237] *Id.* at 201.

as an afterthought, the opinion concluded that the agriculture exemption should be interpreted similarly.[238]

Here, then, was a first consequence of *Avoyelles Sportsmen's League*. To this limited extent, in a program for which the Corps still exercised the enormous power-of-the-permit, no matter what a subsequent reviewing court my do to the *Avoyelles* opinions, the EPA was placed first in the saddle on how far the § 404 program would go. Which was large.

Meanwhile, however, the case itself had to survive on appeal.

X. THE APPEAL

New Orleans, Louisiana, 1983. By the time of the appeal, several political heavyweights were on hand to support the private defendants, and sub rosa the Corps, including the Louisiana Landowner's Association, the Louisiana Department of Agriculture, and even a brief from the Chamber of Commerce, but to small avail.[239] The federal government presented a single, consolidated argument that everything Judge Scott had done was correct, save in rejecting its final wetlands determination in favor of making his own, and in some dicta about whether removing vegetation alone constituted dredge and fill.[240]

The appellate court did not deny Judge Scott's right to review the government's determination, and to find it arbitrary and capricious (i.e., crazy) if the record supported him, but here he had wrongly substituted his own conclusions for those of the expert agencies.[241] At which point, given that the case had gone on so long, the appellate bench went on to make the review itself and find the determination supported by evidence, hence lawful.[242] Given the fact that all but one of the government's experts placed

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[238] *Id.* at 202.

[239] As might be expected, the Louisiana Department of Natural Resources had earlier intervened on the side of the defendants, a position Osborne described as "nauseating." Bob Anderson, *State Agency Intervenes in Suit Over Land Clearing in Avoyelles*, MORNING ADVOC., Apr. 13, 1979, at 9-B. In addition, and somewhat surprisingly, the State of Florida Department of Environmental Protection submitted a brief in favor of the EPA/DOJ position. *Id.*

[240] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 904 (5th Cir. 1983).

[241] *Id.*

[242] *Id.* at 907.

the Lake Long tract at ninety to ninety-eight percent wetlands, the bench's approval of the determination's eighty percent figure was a conservative call. Nonetheless, neither the environmental attack on it nor that of the landowners would prevail.

The bench also scrubbed Judge Scott's conclusions about the land clearing with equal attention, and found them reasonable. The bulldozers were pushing real dirt around, and that was dredge and that was fill.[243] That Scott also talked about mere removal of vegetation as fill as well was immaterial; the facts showed a great deal more than mere vegetation removal.[244]

And so, the case was closed. Judge Scott had done his homework in fact and law. If he went a tad overboard on his wetland conclusions, the appellate bench might have too had it seen the photographs and heard the experts. Bottomland hardwoods are in fact wet lands. After *Avoyelles,* in law as well.

XI. OPHELIA RESCUED

Prevot never did clear the other half of the Lake Long tract, nor did the Louisiana Landowners Association or anyone else. In the immediate term, Prevot and others were checked by the need for the Corps's permits.[245] Then, the backwater flooding so absent in the 1977–1978 season came back with a vengeance in 1979, and again in 1982 and 1983. Landowners who bought portions of the Lake Long tract never made a crop.[246] By that time as well, the world-wide soybean bubble had burst, countries around the world had ramped up production and the heady boom was over.[247] Facing this reality, the Department of Agriculture found other crops to bet on, with mixed results. Over the last decade, federal

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[243] *Id.* at 921-22. The defendants were left with a set of unpersuasive procedural arguments, perhaps the least of which was that Dr. Hans Van Biek was unqualified as an expert in hydrology because he had been educated in the Netherlands, a country renowned for its expertise in hydrology. *Id.* at 918 n.36. Although testifying in his own right, Van Biek also played a "summary witness" role in the case, relied on by the court to reconcile and summarize the testimony of other witnesses. Telephone Interview with Harless Benthul, *supra* note 208.

[244] *Id.* at 920-22.

[245] *See* Robert Morgan, *Court Opinion Could Tighten Land Clearing Control*, TOWN TALK, Nov. 7, 1979, at A-1.

[246] Telephone Interview with Donald Wilson, *supra* note 65.

[247] Telephone Interview with Richard Luddington, *supra* note 18.

subsidies for corn production to make biofuels for automobiles have replaced the soybean craze in subsidies and impacts,[248] which include draining every stream-side marsh and pothole in corn country, and soaring pollution loads downstream.[249] Farm state wetlands are getting hammered these days, the bottomland hardwoods of the lower Mississippi Valley less so. Economics remain the driver, largely fueled by government interventions. The most environmental litigation can do here is buy time for things to change. As it did in *Avoyelles.*

One healthy offset has been the emergence of several Agriculture programs to encourage farmers not to drain and plough marginal croplands,[250] which in a band stretching upriver from central Louisiana has led to the purchase of old, failed soybean fields and their conversion back to hardwood forests.[251] In 2009, the U.S. Fish and Wildlife Service announced that some 16,000 acres of drained soybean lands along the Ouachita River were about to be restored to bottomland hardwoods and managed as a refuge.[252] The Nature Conservancy, the Fish and Wildlife Service, state wildlife agencies, and even monies from the Corps to mitigate the manifold damage from their dams, pump stations, and levees are also at work here.[253] More to the point of this story, the Lake Long tract is now part of the Lake Ophelia National

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[248] *See* COMM. ON WATER IMPLICATIONS OF BIOFUELS PROD. IN THE UNITED STATES, WATER IMPLICATIONS OF BIOFUELS PROD. IN THE UNITED STATES (Nat'l Acad. Press 2008), *available at* http://books.nap.edu/openbook.php?record_id=12039&page=R1.

[249] *Id.*

[250] 16 U.S.C. § 3821 (2006). These monies have, at least for a time, encouraged a shift in land management within the agricultural community. *See* Press Release, U.S. Fish and Wildlife Serv., Louisiana Farmer Wins 2002 National Wetlands Conservation Award (July 1, 2003).

[251] Telephone Interview with Richard Luddington, *supra* note 18; *see also Louisiana*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/southeast/es/partners/StateFactSheets/La_longv.pdf (last visited Apr. 22, 2012); THE CONSERVATION FUND, RESTORING A FOREST LEGACY AT GRAND COTE AND LAKE OPHELIA NATIONAL WILDLIFE REFUGES (2010), *available at* http://www.fws.gov/lakeophelia/pdf/CCBAApplication.pdf.

[252] *See* Cornelia Dean, *Levee Busters Plan to Restore La. Floodplain*, TIMES-PICAYUNE, June 21, 2009, at A-16.

[253] *See* Mohr & Byrd, *infra* note 257; *see also* THE CONSERVATION FUND, *supra* note 251 (discussing The Conservation Fund's "Go Zero Program Bottomland Hardwoods Restoration Initiative.").

Wildlife Refuge, established in 1985.[254] Small steps toward recovery.

Another emerging offset is the growing realization that the value of bottomland hardwoods is not simply in black bear and mallard ducks . . . as dear as they may be to the hearts of this region . . . but as well to store high spring floodwater, before it all comes down at once on heads and houses miles below. Back in 1973, a flood of greater danger than any seen since the monster of 1927 came down the Mississippi, topping local levees and causing the Corps to implement a worst-case contingency plan in Louisiana.[255] It worked, but it was harrowing. Equally harrowing was a report in *Science* magazine concluding that, yes, the rainfall had been heavy, but not a once-in-a-lifetime event; rather, due to the river's constriction and development of the upstream flood plain, the flood of 1973 was "man-made."[256] In 2011, another "record" flood came down the Mississippi River[257] and it seems predictable that someone will do a similar study and arrive at the same conclusion. The backwater hollows, lakes, sloughs, swales, marshes, sumps, and forests of the lower Mississippi basin are the best possible antidote to downstream disaster. They will hold water and save lives.

XII. THE CONTINUING MARRIAGE

It remains a difficult marriage. There have been few quiet moments, save those where federal administrations have simply silenced the Environmental Protection Agency altogether. The two agencies have continued to differ at all levels, at times bitterly,

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[254] *Lake Ophelia National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/lakeophelia/ (last visited Apr. 22, 2012).

[255] *See* Raphael G. Kazmann & David B. Johnson, *If the Old River Control Structure Fails? (The Physical and Economic Consequences)*, 12 LA. WATER RESOURCES RES. INST. 10, 10-12 (1980).

[256] C. B. Belt, Jr., *The 1973 Flood and Man's Constriction of the Mississippi River*, 189 SCI. 681, 684 (1975); *see also* Robert E. Criss, *Increased Flooding of Large and Small Watersheds of the Central USA and the Consequences for Flood Frequency Predictions*, *in* FINDING THE BALANCE BETWEEN FLOODS, FLOOD PROTECTION, AND RIVER NAVIGATION 16 (Robert E. Criss & Timothy M. Kusky eds., 2009), *available at* http://www.ces.slu.edu/annualreport/FloodForum_Book_final.pdf.

[257] *See* Holbrook Mohr & Shelia Byrd, *Mississippi Delta Braces for Historic River Flooding*, NOLA.COM (May 10, 2011, 4:50 PM), *available at* http://www.nola.com/weather/index.ssf/2011/05/mississippi_delta_braces_for_h.html.

over the geographic reach of § 404,[258] a scientific manual for determining wetlands species and characteristics,[259] the wording of the EPA's guidelines for permit decisions,[260] their application and binding effect,[261] the consideration of particular impacts,[262] the consideration of cumulative impacts,[263] the scope of alternatives,[264] the role of mitigation in permit decisions,[265] the measurement and rules for mitigation,[266] the EPA's veto authority,[267] and the responsibility for enforcement and subsequent enforcement decisions.[268] Have we left anything out? Every day is wetland fight day somewhere in America.

It is consequential. On the outcomes of this "pluralistic" governance hang resource decisions the size of mountaintop mining in the Appalachians,[269] western water reservoirs,[270]

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[258] The delineation of upstream jurisdiction has been a chronic issue, including the concept of adjacent wetlands. The Corps has made expansive interpretations at times, only to be rebuked by slim and conservative majorities of the Supreme Court. *See* Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

[259] *See* U.S. FISH AND WILDLIFE SERV. ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS: AN INTERAGENCY COOPERATIVE PUBLICATION (1989), *available at* www.wetlands.com/pdf/89manv3b.pdf.

[260] *See* Lawrence R. Liebesman, *The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program—Judicial Interpretation and Administrative Application*, 14 ENVTL. L. REP. 10,272, 10,275-76 (1984).

[261] Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 775-89 (1989).

[262] *Id.* at 784-87.

[263] *See* Nat'l Wildlife Fed'n v. Norton, 332. F. Supp. 2d 170 (D.D.C. 2004) (Florida panther).

[264] Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987) *aff'd*, 850 F.2d 36 (2d. Cir. 1988); *see also* Houck, *supra* note 261, at 775-89.

[265] *See* Memorandum of Agreement between the Dep't of the Army and the Envtl. Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.CFM; *see also* Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the Sec. 404 Program*, 20 ENVTL. L. REP. 10,212 (1990); WANT, *supra* note 12, at 6-24 to -26.

[266] *See* 33 C.F.R. § 332.3 (2008).

[267] *See* 33 U.S.C. § 1344(c) (2006) (veto authority); *see also infra* text accompanying notes 269, 273, 274.

[268] Blumm & Zaleha, *supra* note 34, at 709-10.

[269] Daniel Malloy, *EPA Vetoes Mining Permit in West Virginia*, PITT. POST-GAZETTE, Jan. 14, 2011, *available at* http://www.post-gazette.com/pg/11014/1117862-113.stm.

Canadian tar sands pipelines,[271] the disposal of mining slurries,[272] oil and gas exploration across the Alaska tundra,[273] gold mining at the mouth of Bristol Bay,[274] and, last but not least, the continuing drainage of Mississippi bottomland forests.[275] The mindsets have not fundamentally changed. The Corps remains at heart a construction company, and the EPA remains a green police force, underfunded and politically outgunned, feeling its way.

The § 404 program has had, nonetheless, a profound impact on the Corps. Having inherited the portfolio it has had to staff, and after the *Callaway* case, one began seeing wildlife biologists, plant and fisheries specialists, soil scientists, resource economists, and others who could perform the required analyses. While not always the case, this new cadre, including environmental lawyers, tended to be greener than the traditional run of engineers. They have now been in place for several decades. They have moved up the grade scale, and assumed larger functions. Neither they nor the EPA may win every permit decision, or even most of them, but these people, on the ground, in permitting and enforcement, trying to do their best, do better than anything seen before.

Decisions like *Avoyelles* empower them.

XIII. REQUIEM

One of the phenomena of this case was the depth in which its presiding magistrate dug into it, facts and law, and made them his own. What would lead him to do so? It seems to have been, at

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[270] Keith Schneider, *Colorado Dam Would Ruin Wildlife Area, an E.P.A. Official Says*, N.Y. TIMES, Aug. 30, 1989, *available at* http://www.nytimes.com/1989/08/30/us/colorado-dam-would-ruin-wildlife-area-an-epa-official-says.html.

[271] Elana Schor, *EPA Seeks Expanded Review of Proposed Oil Sands Pipeline*, N.Y. TIMES, June 7, 2011, *available at* http://www.nytimes.com/gwire/2011/06/07/07greenwire-epa-seeks-expanded-review-of-proposed-oil-sand-60126.html (A link to a PDF copy of the EPA's comments is available at the bottom of the article.).

[272] Coeur Alaska v. Se. Alaska Conservation Council, 557 U.S. 261 (2009).

[273] *See* E-mail from Vicki Clark, Legal Director, Trustees for Alaska, to author (Feb. 20, 2012) (on file with author) (describing conflicts between the Corps over oilfield development in Alaska).

[274] *See* Manuel Quinones, *Foes of Alaska Mine Go to Bat for EPA Veto Power*, SAVE BRISTOL BAY, July 21, 2011, *available at* http://www.savebristolbay.org/for-the-press/news-archive/water-policy-foes-of-alaska-mine-go-to-bat-for-epa-veto-power-energy-and-.

[275] Bd. of Miss. Levee Comm'n v. EPA, No. 11-60302, 2012 WL 695844 (5th Cir., Mar. 6, 2012) (upholding EPA veto of Corps Yazoo Area Pump Project).

least, an awareness of place and what he saw around him. He took the time to look out the window. Wilson recalls a down moment in chambers, early on in the trial, where Judge Scott mused about driving from Alexandria to Baton Rouge.[276] Just a few years back it was all swamp, tupelo gum, cypress, and hardwood trees. The next day it was soybean fields. "Judge Scott was like, how did they do that?"[277] When a judge actually feels what a case is about, plaintiffs are usually well on their way.

He was also in the same way aware of the human impacts, evident from his treatment of several *Avoyelles* witnesses, which, while perhaps part of his DNA, may also have been heightened by his experience with the desegregation cases. Here, again, were people being shrugged off by a government that was going to great pains to avoid doing what the law intended it do.[278]

Judge Scott took senior status on the federal bench in 1984, and was still serving, although quite ill, until his death in 2002. They say that the best requiem for any human being is the opinion of other people on how they did. While the *Avoyelles* case was hardly the biggest or most controversial one he ever handled, it seems clear that he developed a passion for it and, on that journey, earned a level of respect rarely expressed by the lawyers and witnesses involved.

Fred Disheroon, U.S. Department of Justice:

> I really liked Judge Scott, thought he was a terrific judge . . . historically, you wouldn't have thought one from Louisiana

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[276] Telephone Interview with Donald Wilson, *supra* note 65.

[277] *Id.*

[278] Coincidence or no, several of the seminal environmental opinions in American law were authored by judges who had fought their way through segregation; Justice Thurgood Marshall directed the litigation strategy of the NAACP, Judge Skelly Wright's anti-segregation opinions in New Orleans led to his transfer to Washington, D.C. lest he be assaulted or killed. Reading the opening lines of their opinions, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (Justice Marshall writing); and *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (Justice Wright writing), one finds a direct path from civil rights to environmental rights, a transition that continues today on a world-wide stage. *See* OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD (2010) (describing the transition from civil to environmental rights in, inter alia, India, the Philippines, and Chile).

> would be so progressive.[279] As for the errors on appeal: He was in unchartered territory with these [wetland] determinations, no real guidance on how exactly to go about it. So it wasn't surprising that he would make his own. He saw that as his job.[280]

James T.B. Tripp, Environmental Defense Fund:

> When I first met him he struck me as being a kind old gentleman . . . but boy was he well grounded. He saw through the expert witnesses for good or bad. He was willing and able to be educated on these complicated wetland systems. He was a first-rate, practical thinker, and his opinions were very thorough.[281]

Michael Osborne, National Wildlife Federation:

> He was a gentleman through and through. And he worked as hard as any judge I ever knew. This was the only case I had before him, and I regret that.[282]

Don Wilson, Avoyelles Sportsmen's League:

> He was an old curmudgeon, but he had handled all the big desegregation cases in Rapides [Parish], Avoyelles, and Point Coupe, maybe they make you that way. He was bright and absolutely fearless . . . wouldn't let anyone blow smoke up his ass. I tried and lost cases before him, but he was always fair.[283]

Dale Hall, U.S. Fish and Wildlife Service:

> In all the cases I have been involved in, no judge has ever risen to the level of professionalism that Nauman Scott had. He was clear and concise in his rulings. He wanted to understand. If there was something he didn't understand in the case he would stop the attorney and say, say that again,

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[279] Telephone Interview with Fred Disheroon, *supra* note 136.

[280] *Id.*

[281] Telephone Interview with James T.B. Tripp, *supra* note 132.

[282] Telephone Interview with Michael Osborne, *supra* note 152.

[283] Telephone Interview with Donald Wilson, *supra* note 65.

> or what did you mean there. He was very courteous with everybody. He showed a great deal of compassion.[284]

And, in dissent, Marc Dupuy, for the landowners:

> [Scott's ruling was] stupid . . . an absurdity . . . so far out in left field that others wouldn't follow it.[285]

Technically, as a matter of ninety percent wetland versus eighty percent wetland, Dupuy was of course correct. But the language is sour. Then again, he did not win the case.

Overall, the consensus is quite strong.

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[284] Telephone Interview with Dale Hall, *supra* note 166.

[285] Dupuy Oct. Interview, *supra* note 2. When the Lake Long clearing was enjoined, a bank owned by Albert Prevot went into bankruptcy. An audit performed by federal regulators revealed that Prevot had engaged in bank fraud, moving mortgages from bank to bank and apparently profiting from each transfer, for which he was criminally convicted. Telephone Interview with Donald Wilson, *supra* note 65.

THE *JOURNAL*'S JOURNEY: A HISTORY OF THE *MISSISSIPPI LAW JOURNAL*

*Spencer M. Ritchie**

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INTRODUCTION

> So, it is with a sense of pride, we present this maiden issue of the *Mississippi Law Review* to the profession of the state. Yet, this number of the *Review* is little more toward our dream of what law review should be than the first faltering step of a baby toward accomplishing its feat of walking. In common parlance, we have "broken the ice," or set a precedent so that the future students of the law school will not hesitate to plunge in the water, or to push this precedent into its proper place of prestige.[1]

So wrote Joseph M. Howorth, the first student to serve as editor-in-chief of the *Mississippi Law Review*, the little-known predecessor to the *Mississippi Law Journal*.[2] While the *Review* suffered a quick demise—it was only published from 1922 to 1923[3]—it did succeed in setting a precedent for future law

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[1] *Mississippians, We Serve*, 1 MISS. L. REV. 12, 12 (1922).

[2] *Id.*

[3] Michael de L. Landon, *The Origins of the Mississippi Law Journal*, 50 MISS. L.J. 1, 4 (1979).

students, such that only five years later the *Review* was resurrected in the form of the *Mississippi Law Journal*, now in its eighty-third year of existence.

The *Mississippi Law Journal* is one of the oldest student-edited law reviews in the American South. In fact, stretching back to its origin in 1922 with the founding of the *Mississippi Law Review*, the *Journal* is the fourth-oldest student-edited law review in the South, with only the *Virginia Law Review* (1913),[4] the *Tulane Law Review* (1916),[5] and the *Loyola Law Review* (1920)[6] preceding it.[7]

In January of 2011 the *Journal* moved its offices into the newly constructed Robert C. Khayat Law Center.[8] The *Journal*'s office in the new building is its sixth in over eight decades. Thus, in a new office, in a new law building, now is an appropriate time to review the *Journal*'s rich and remarkable history through some of the more important events, persons, and articles in the life of the *Journal*.

I. VENTRESS AND LAMAR (FARLEY) HALLS: 1922–1946

The journey of the *Mississippi Law Journal* began in November of 1922 with the publication of the first issue of the *Journal*'s obscure predecessor, the *Mississippi Law Review*.[9] At

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[4] *About VLR*, VA. L. REV., http://www.virginialawreview.org/page.php?s=general&p=about (last visited Apr. 25, 2012).

[5] *Tulane Law Review: A History*, TUL. L. REV., http://www.law.tulane.edu/tlsjournals/lawreview/index3.aspx?id=13168 (last visited Apr. 25, 2012).

[6] Brian Huddleston, *Loyola Law School in the Early 1920s*, LUNO LAW LIBRARY BLOG (Mar. 31, 2011, 9:05 AM), http://lunolaw.blogspot.com/2011/03/loyola-law-school-in-early-1920s.html (last visited Apr. 25, 2012).

[7] The *Texas Law Review* and the *North Carolina Law Review* were also founded in 1922, the year the *Mississippi Law Review* was founded. Contrary to popular belief, the *Harvard Law Review*, founded in 1887, was not the first student-edited law review in the United States. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 763 (1985). Appearing before the *Harvard Law Review* were two short-lived student-edited journals, the *Albany Law School Journal*, founded in 1875, and the *Columbia Jurist*, founded in 1885. *Id.* at 764-69. Nevertheless, of the reviews that continue to be published today, Harvard's is the oldest. *Id.* at 779. After Harvard, the next five law schools to publish student-edited reviews were Yale (1891), Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern (1906). *Id.* By 1930, forty-three United States law schools featured law reviews. *Id.* at 787.

[8] *See Dedication of the Robert C. Khayat Law Center*, 81 MISS. L.J. 1 (2011).

[9] 1 MISS. L. REV. 1 (1922).

that time, the law school was housed in what is now known as Ventress Hall.[10] The *Review* was edited and published by a University of Mississippi law school honor society known as The Blackstone Law Club and was patterned after similar reviews published by law students at Harvard and the University of Virginia.[11] The goal of the *Review* was to publish "notes on Recent Decisions, critical book reviews, news of the Mississippi Bar Association, and other articles of interest contributed by leading lawyers of the state."[12] Although most of its subscribers were members of the Mississippi Bar (Bar), the *Review* had no official connection to the Bar.[13]

In the spring of 1922, a female student named Addie McCain was elected by her peers as the first editor of the *Review*.[14] But because Miss McCain did not return to the law school in the fall of 1922, Joseph M. Howorth was elected in her place and was the first student to actually serve as editor.[15] One of the six associate editors of the *Review*'s first issue was Robert J. Farley,[16] who would become an important mentor to the *Mississippi Law Journal* while serving as the eighth dean of the law school from 1946 to 1963.[17]

The *Review* published five issues comprising one volume, the publication of which was thought to be a factor in the prestigious American Association of Law School's bestowing the law school

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[10] MICHAEL DE L. LANDON, THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW: A SESQUICENTENNIAL HISTORY 49 (2006). The law school moved into Ventress Hall in 1911. *Id.* Before that time the building housed the university's main library. *Id.* When the law school occupied the building it was officially called "Lamar Hall," but it was more commonly referred to as simply the "law building." *Id.*

[11] Landon, *supra* note 3, at 3.

[12] *Id.* (citing MISSISSIPPIAN, Oct. 6, 1922, at 3).

[13] *Well Begun, Half Done*, 1 MISS. L. REV. 90, 91 (1922-23).

[14] Landon, *supra* note 3, at 4.

[15] Landon, *supra* note 3, at 4; *see also Mississippians, We Serve*, *supra* note 1, at 13. Joseph M. Howorth went on to practice law in Jackson, Mississippi with his wife, Lucy Somerville Howorth. Dorothy S. Shawhan & Martha H. Swain, LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH 56 (2006). In 1934, President Franklin D. Roosevelt appointed Mrs. Howorth to the United States Board of Veterans Appeals, and her husband accompanied her to Washington, D.C. *Id.* at 81-83. In 1954, the couple returned to Mississippi and established a law practice together in Cleveland. Mr. Howorth died in 1982. *Id.* at 136.

[16] 1 MISS. L. REV. 12 (1922).

[17] LANDON, *supra* note 10, at 81.

with an "A" rating in 1924.[18] In the spring of 1924, however, the Mississippi legislature cut its annual appropriation to the state's colleges and universities, forcing the University of Mississippi law faculty to end its subsidy of the *Review*.[19] As a result of the loss of the subsidy, the *Review* published its last issue in April of 1923.[20]

Nevertheless, it was not long before the law school and members of the Bar revived the idea for a scholarly publication. At the May 1928 meeting of the Bar at the Markham Hotel in Gulfport, Bar President R.E. Wilbourn shared with his fellow members an idea put forth by then Secretary-Treasurer Louis M. Jiggits.[21] Jiggits had suggested that the Bar follow the example of Minnesota and partner with the University of Mississippi to publish a quarterly law journal.[22] Wilbourn suggested that the proposed journal publish Bar materials, such as the proceedings of the annual meeting, and that:

> News of the State Law School, reviews of the current State and United States Supreme Court Decisions, and discussions of timely topics of interest to the Bar, and tending to promote high ethical ideals, and a proper attitude toward law reform would constitute further material for the pages of such journal.[23]

Wilbourn explained that the journal could be funded by the money the Bar spent every year to publish their proceedings, with income generated from subscriptions to the journal and by advertisements within the journal.[24] A board of directors, consisting of the law school dean and officers of the Bar, would oversee the law student staff's editing and publishing of the journal.[25] The *Journal*'s student editors would be "selected on the basis of their Law School records and aptitude for research."[26]

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[18] Landon, *supra* note 3, at 4.

[19] *Id.*

[20] *Id.*

[21] *Proceedings of Twenty-Third Annual Meeting of the Mississippi State Bar Association*, 1 MISS. L.J. 14, 49 (1928) [hereinafter *Twenty-Third Annual Meeting*].

[22] *Id.*

[23] *Id.* at 49-50.

[24] *Id.* at 49.

[25] *Id.*

[26] 35 BULLETIN OF UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW 14 (1936-37). The bulletins were published as part of the university's annual school catalogue. The

W.B. Mixon of McComb raised the only concern about the journal proposal when he scornfully asked, "Would the students tell the lawyers of the State what they ought to do? That's going to be done by the students of the University of Mississippi?"[27] The University of Mississippi School of Law Dean Thomas C. Kimbrough calmly reassured Mr. Mixon and others that the student editors would certainly not attempt to teach the state's lawyers how to practice law and that student-edited law reviews were common across the United States.[28] Otherwise, the journal idea received overwhelming support from members of the Bar, and, on May 3, 1928, the Bar voted to approve the proposal.[29]

The *Mississippi Law Journal* was launched without delay, and at the 1929 meeting of the Bar the *Journal*'s first editor-in-chief Dugas Shands and its first business manager H. Edwin White gave a successful report of the *Journal*'s first year.[30] The *Journal*'s first issue was the July 1928 issue, and it contained the proceedings of the 1928 Bar meeting.[31] The note editor for that

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annual catalogues can be found in the Department of Special Collections at J.D. Williams Library on the University of Mississippi campus. In the early years of the *Journal*, students were selected for membership by the dean of the law school in collaboration with the faculty. *See Proceedings of the First Annual Meeting of the Mississippi State Bar*, 5 MISS. L.J. 2, 36 (1932) [hereinafter *First Annual Meeting*]. While the students of the *Journal* now select new members themselves, the official and generic description of how *Journal* members are selected remains almost identical to what it was in 1932: the 2010-11 Law School Catalog states that "[s]tudents are selected for the editorial staff of the *Journal* based on their scholastic records and their aptitude for legal research and writing." UNIV. OF MISS., 2010-11 SCHOOL OF LAW CATALOG: BULLETIN OF THE UNIVERSITY OF MISSISSIPPI 8.

[27] *Twenty-Third Annual Meeting*, *supra* note 21, at 108.

[28] *Id.* at 108-09.

[29] *Id.* at 110-11.

[30] *Proceedings of the Twenty-Fourth Annual Meeting of the Mississippi State Bar Association*, 2 MISS. L.J. 8, 33-34 (1929) [hereinafter *Twenty-Fourth Annual Meeting*]. Shands's tenure as editor-in-chief lasted one year. For most of the *Journal's* history the tenure for editors-in-chief and other *Journal* leadership positions has been one year. However, for a period in the 1970s and 1980s the *Journal* experimented with having an editor-in-chief each semester, including the summer (three per calendar year), and having two editors-in-chief per calendar year (each serving approximately six months). *See* REPORT OF THE COMMITTEE ON TENURE OF THE EDITOR-IN-CHIEF OF THE MISSISSIPPI LAW JOURNAL 1 (Feb. 21, 1985) (on file with the *Mississippi Law Journal*). The *Journal* has since returned to the one-year tenure model. *See* 81 MISS. L.J. masthead (2012).

[31] *See* 1 MISS. L.J. 1, 14 (1928).

first issue was John C. Satterfield,[32] who, in 1961, would serve as president of the American Bar Association.[33]

In total, the *Journal*'s first volume comprised four issues. The most notable article of this volume was the Mississippi annotations to the American Law Institute's *Restatement of Torts*, compiled by Chief Justice Sydney Smith of the Mississippi Supreme Court.[34] At its beginning, the *Journal* had 140 subscriptions from members of the Bar, eighty-six subscriptions from law schools, forty-six from lawyers who were not members of the Bar, and a subscription from every University of Mississippi law student.[35] There were also five subscribers in Germany, one in the Philippines, and several subscribers from Canadian universities.[36]

In the 1929-30 academic year there were 105 students enrolled in the University of Mississippi School of Law.[37] Among that population was Lyda Gordon Shivers, who was the first female to receive a law degree from the University of Mississippi.[38] Shivers was a member of the *Journal*, serving as an associate editor,"[39] and went on to become a longtime faculty member at the University of North Carolina at Greensboro, including serving as chair of its sociology department from 1954 to 1968.[40]

While the *Journal* was off to a good start, it did not take long for its livelihood to be tested. With the crash of the stock market in 1929, the nation's economy plummeted, and the *Journal* was not immune from the effects. In 1931, declining membership forced the Bar to cut the *Journal*'s subsidy to half of what it had

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[32] *See* 1 MISS. L.J. iii (1928).

[33] LANDON, *supra* note 10, at 63. Prior to serving as president of the ABA, Satterfield was president of the Mississippi state bar in 1954-55. *Id.*

[34] *See Mississippi Annotations of the American Law Institute Torts*, 1 MISS. L.J. 236 (1928).

[35] *Twenty-Fourth Annual Meeting*, *supra* note 30, at 39-40.

[36] *Id.* at 40.

[37] LANDON, *supra* note 10, at 64.

[38] *Department of Sociology: History*, UNIV. OF N.C. GREENSBORO, http://www.uncg.edu/soc/general/history.html (last visited Apr. 25, 2012).

[39] *See* 2 MISS. L.J. 235 (1929).

[40] *Department of Sociology*, *supra* note 38.

been the previous year.[41] While Volume 2 contained 492 pages,[42] Volume 3 dropped to 358 pages,[43] and Volume 4 would consist of only three issues and 225 pages.[44] It must have appeared to many at the time that the *Journal* would suffer the same fate as its short-lived predecessor.

However, two things happened that together secured the *Journal*'s continued vitality. In 1932, the Mississippi state legislature passed the Unified Bar Act, requiring every one of the nearly 1300 lawyers in the state to become a dues-paying member of the state bar association.[45] Then, at the first annual meeting of the unified Bar, held in September of 1932, the Bar approved a plan to send copies of the *Journal* to each member of the now vast Mississippi Bar Association.[46] To accommodate this plan, the Bar tripled the subsidy it had allocated to the *Journal* the previous year.[47] The *Journal* had survived its first test.

The first annual meeting of the unified Bar was significant for the *Journal* in other ways as well. At that meeting the Bar agreed to establish a committee comprised of select members of the Bar to oversee and serve as liaison to the *Journal*.[48] The committee existed in some form until 1981, the year the Bar relinquished its oversight of the *Journal*.[49] The members also agreed that the dean of the law school should appoint a faculty committee to oversee the work of the *Journal's* student editors.[50] This group of faculty overseers still exists today in the form of the *Journal's* faculty advisors.[51]

In 1930, construction of a new, three-story law building was completed. Along with "a club room, lounging room, locker room,

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[41] *Proceedings of the Twenty-Sixth Annual Meeting of the Mississippi Bar Association*, 4 MISS. L.J. 4, 69 (1931).

[42] *See generally* 2 MISS. L.J. 1 (1929).

[43] *See generally* 3 MISS. L.J. 1 (1930).

[44] *See generally* 4 MISS. L.J. 1 (1931).

[45] *See* 1932 Miss. Laws ch. 121; *see also* Landon, *supra* note 3, at 6.

[46] *First Annual Meeting*, *supra* note 26, at 35-38.

[47] *Id.*

[48] *Id.*

[49] The state bar committee responsible for overseeing the *Journal* went by different names over the years: "Committee on the Law Journal," "Law Journal—Law School Liaison Committee," and the "Law School Liaison and Education Committee."

[50] *First Annual Meeting*, *supra* note 26, at 35-38.

[51] *See* 81 MISS. L.J. masthead (2012).

and work rooms" for students, the ground floor of Lamar Hall, now known as Farley Hall, included "a large and commodious *Law Journal* room," which served as the "office of the Editor and Business Manager of the *Mississippi Law Journal*."[52] Hugh N. Clayton was the first editor-in-chief to occupy that "large and commodious" office space.[53] Clayton would go on to have an illustrious career in his law practice and in service to his community. His many accomplishments include founder and first president of the Young Lawyers Division of the Mississippi Bar,[54] president of the Bar in 1959,[55] and longtime Mississippi delegate to the American Bar Association.[56] Clayton passed away in 1994 at the age of eighty-six.[57]

Three years after Hugh N. Clayton served as editor, the *Journal* was led by another student who would later achieve notoriety. John W. Wade, editor-in-chief of the *Journal* in 1933-34, was Dean of Vanderbilt Law School from 1952 to 1972[58] and co-author of successive editions of a widely-used casebook on tort law.[59] In addition to being a student member of the *Journal*, Wade served as the *Journal*'s faculty advisor from 1936 to 1943 and 1945 to 1946 before leaving the University of Mississippi to join the faculty at Vanderbilt.[60]

While the *Journal*'s relationship with the Bar meant that it never had to fear for subscribers, it also exposed the *Journal* to occasional meddling from members of the Bar. At the 1935 annual

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[52] LANDON, *supra* note 10, at 71.

[53] *Id.*

[54] *Id.* at 77.

[55] *Past Presidents of the Mississippi Bar*, MISS. BAR, http://www.msbar.org/past pres.php (last visited Apr. 27, 2012).

[56] 140 CONG. REC. S7056-58 (daily ed. June 16, 1994) (statement of Sen. Thad Cochran), *available at* http://www.gpo.gov/fdsys/pkg/CREC-1994-06-16/html/CREC-1994-06-16-pt1-PgS34.htm.

[57] *Id.*

[58] *A Brief History of Vanderbilt University Law School*, VAND. L. SCH., http://law.vanderbilt.edu/about-the-school/history/index.aspx (last visited Apr. 27, 2012).

[59] The casebook is now in its twelfth edition. *See* WILLIAM L. PROSSER, JOHN W. WADE, VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS (12th ed. 2010).

[60] *See* Ronald J. Rychlak, *John Wade: Teacher, Lawyer, Scholar*, 65 MISS. L.J. 1, 5 (1995). Wade was absent from the law school from 1943-45 because he enlisted in the United States Marine Corps as an intelligence officer. *Id.*

Bar meeting, the *Journal*'s printing contract came under scrutiny. At that time the *Journal* was using a company out of Jackson, Tennessee for printing and mailing of its publication.[61] But, during consideration of the *Journal*'s annual appropriation, Judge W.H. Powell expressed frustration that the *Journal* was using an out-of-state printer and made a motion that the printing contract be awarded to a Mississippi company.[62] Mr. J.V. Gibson joined the debate and expressed a separate concern that the printing be done by union labor.[63] In the end, David C. Bramlette, Chairman of the Law Journal Committee, succeeded in rebutting these concerns, stating that he was "opposed to hog-tying these young gentlemen managing this journal, who are managing it so well."[64] Nevertheless, in 1936, undoubtedly fearful of future controversy, the *Journal* contracted with a company from Meridian for its printing and mailing.[65]

In Volume 11 (1938-39), the *Journal* began including in each issue a review of recent decisions by the Mississippi Supreme Court.[66] Law faculty and lawyers in the state wrote the reviews. The *Journal* would continue this practice off and on over the years, and it remains today in the form of the Mississippi Briefing Service, written by student members of the *Journal*.[67] In the spring of 2012 the *Journal* launched *BriefServ*, an online, searchable database of these case briefs.[68]

The *Journal* launched another program during this period that still exists today. The 1938-39 law school bulletin announced:

> Each year awards are made by the faculty of the School of Law and the Editorial Board of the *Mississippi Law Journal* to the writer of the best Case Note and the writer of the best

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[61] *Proceedings of the Thirtieth Annual Meeting of the Mississippi State Bar*, 8 MISS. L.J. 4, 80-84 (1935).

[62] *Id.* at 81.

[63] *Id.* at 82-84.

[64] *Id.* at 84.

[65] *Proceedings of the Thirty-First Annual Meeting of the Mississippi State Bar*, 9 MISS. L.J. 6, 109 (1936).

[66] *See* C. Sydney Carlton, Note, *The Work of the Mississippi Supreme Court For the September 1937, and the March 1938, Terms*, 11 MISS. L.J. 1 (1938).

[67] *See Welcome to BriefServ*, BRIEFSERV, http://msbriefserv.com/ (last visited Apr. 15, 2012).

[68] *Id.*

> Case Comment appearing during the current year in the *Mississippi Law Journal*. These awards consist of law books to be selected by the recipients.[69]

While law books are no longer given as awards and the students themselves now select the recipients, the *Journal* continues to annually recognize the writers of the best case note and best comment.[70]

Alternatively, the *Journal* has long since lost the benefit of a law school policy established in 1940 and in place for many years after: "Every student in the Law School is required to pay a fee of $1.00 per semester to the *Mississippi Law Journal* and is entitled to receive all current issues of the *Journal*."[71] Law students who had not been selected for membership on the *Journal* were probably relieved when they no longer were required to help subsidize it.

In 1942, Evelyn Gandy became the first woman to serve as editor-in-chief of the *Journal*.[72] She was also the first woman elected as president of the law school student body.[73] Gandy would later become the first woman in Mississippi ever elected to the offices of State Representative, State Treasurer, State Insurance Commissioner, and Lieutenant Governor.[74] Gandy died in January of 2007 at the age of eighty-seven.[75]

In 1945, the *Journal*'s last year with an office on the ground floor of Lamar Hall, the *Journal* published an issue dedicated to the memory of Thomas C. Kimbrough, Dean of the University of Mississippi School of Law from 1921 to 1930 and 1932 to 1945.[76] Dean Kimbrough was instrumental in launching both the *Mississippi Law Review* and the *Mississippi Law Journal* and is one of the most revered deans in the law school's history. Under

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[69] 37 BULLETIN OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW 17 (1939).

[70] *See Awards*, MISSISSIPPI LAW JOURNAL, http://mississippilawjournal.org/about-us/awards/ (last visited Apr. 15, 2012).

[71] 38 BULLETIN OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW 17 (1940).

[72] LANDON, *supra* note 10, at 80.

[73] *Evelyn Gandy,* STENNIS CTR. FOR PUB. SERV. LEADERSHIP, http://www.stennis.gov/programs/womens-leadership-initiatives/lindy-boggs-award/78-evelyn-gandy-1998 (last visited Apr. 27, 2012).

[74] *Id.*

[75] *Id.*

[76] *See Dean T.C. Kimbrough*, 17 MISS. L.J. 307, 307-313 (1946).

Dean Kimbrough, the law school expanded its enrollment and rose in national status.[77] Dean Kimbrough died in December of 1945 and was replaced as Dean by Robert J. Farley.[78]

II. THE DEAD HOUSE: 1946–1959

Enrollment at the law school dropped sharply as a result of World War II.[79] Despite the fewer number of students, the *Journal* was able to report after the war that it was "particularly proud of the fact that the *Journal* was able to continue publication, without a lapse, during the recent war."[80]

While enrollment had fallen to twenty-two in the 1944-45 academic year, it jumped to over one hundred in the 1945-46 academic year—the academic year immediately after the war.[81] As a result of the post-war rise in enrollment, the law building had become over-crowded, and in July of 1946 a small brick structure that sat behind the law building was given to the *Law Journal* for exclusive use as its office.[82] This building was known as the "Dead House."[83]

The building earned its name during the Civil War when it was used as a morgue to house the bodies of soldiers after the battle of Shiloh on April 6-7, 1862.[84] The morgue was used alternately by the Confederate and Union armies during the course of the war.[85] After the Civil War, the building was used as the Delta Kappa Epsilon fraternity house and as a residence for faculty members.[86]

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[77] LANDON, *supra* note 10, at 53.

[78] *Id.* at 81.

[79] LANDON, *supra* note 10, at 80.

[80] Robert J. Farley, *School of Law in* ANNUAL REPORT OF THE CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI 71(1948).

[81] LANDON, *supra* note 10, at 80.

[82] R.J. Farley, *School of Law in* ANNUAL REPORT TO THE CHANCELLOR FOR THE SESSION 1946-1947 BY THE DEAN OF THE UNIVERSITY 47 (1947).

[83] LANDON, *supra* note 10, at 83.

[84] LANDON, *supra* note 10, at 83.

[85] *Proceedings of the Nineteenth Annual Meeting of the Junior Bar Section*, 26 MISS. L.J. 301, 314-15 (1954) [hereinafter *Nineteenth Annual Meeting of the Junior Bar Section*].

[86] LANDON, *supra* note 10, at 83.

When the *Journal* took over the Dead House it had fallen into disrepair.[87] With the help of Dean Robert J. Farley, however, the *Journal* was able to renovate the building, transforming it into a comfortable place in which to work.[88] The building contained an editorial and business office, a reception room, three work rooms for *Journal* members, and a small library.[89] While possibly a bit frightened by its past, members of the *Journal* were proud of their little building, and boasted in their annual report to the Bar that the "*Journal* has the distinction of being one of the very few, if not the only, law journals in the nation maintaining a private building of its own."[90]

One of the first editors-in-chief to occupy the Dead House was a young man from Grenada, Mississippi named William F. Winter. Winter, editor-in-chief in 1948,[91] would later serve as the fifty-eighth Governor of Mississippi from 1980-84.[92] Governor Winter led the *Journal* in compiling a cumulative index of its first twenty volumes, which would later be published in 1950.[93] Also under Winter, the *Journal* began awarding certificates of service to *Journal* staff upon graduation from the law school, a practice that continues today.[94]

During this period the *Journal* became closely involved with a consortium of southern law reviews called the Southern Law Review Conference, and on March 25-26, 1949, the *Journal* hosted

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[87] *Proceedings of the Fourteenth Annual Meeting of the Junior Bar Section*, 21 MISS. L.J. 456, 472 (1949).

[88] *Id.* The *Journal*'s extensive renovation of the Dead House included the addition of a room by closing in a former porch. SCHOOL OF LAW ANNUAL REPORT 72 (1947-1948). "Paint and wallpaper were applied to the interior walls and ceilings, some of the floors were sanded and varnished, Venetian blinds were hung, and fluorescent lights were installed." *Proceedings of the Forty-Fourth Annual Meeting of the Mississippi State Bar*, 20 MISS. L.J. 424, 509 (1949) [hereinafter *Forty-Fourth Annual Meeting*]. Additionally, the outside of the building was painted. *Proceedings of the Sixteenth Annual Meeting of the Junior Bar Section*, 23 MISS. L.J. 336, 358 (1952). Finally, the interior was painted and wallpapered and the floors were refinished. *Proceedings of the Seventeenth Annual Meeting of the Junior Bar Section*, 24 MISS. L.J. 383, 394 (1953).

[89] *See* LANDON, *supra* note 10, at 83.

[90] *Nineteenth Annual Meeting of the Junior Bar Section*, *supra* note 85, at 314.

[91] *See* 19 MISS. L.J. masthead (1948).

[92] *The Honorable William F. Winter*, WILLIAM WINTER INST. FOR RACIAL RECONCILIATION, http://www.winterinstitute.org/pages/aboutus.htm (last visited Apr. 29, 2012).

[93] *Forty-Fourth Annual Meeting*, *supra* note 88, at 511.

[94] *Id.* at 510.

its third-annual meeting.[95] Seventy-six delegates attended the event, representing law reviews from fifteen southern law schools, such as the University of Texas, Vanderbilt University, and the University of Virginia.[96] The conference featured an address from the Honorable Joseph C. Hutcheson, Jr., Chief Judge of the United States Court of Appeals for the Fifth Circuit.[97] As a sort of happy hour, Dean Robert J. Farley and *Journal* staff invited delegates to the Dead House for a "Coca-Cola party" after the second day of meetings.[98] At the conference's conclusion, the delegates elected Professor William N. Ethridge, Jr., faculty advisor to the *Journal*, as Chairman for the following year's conference.[99] According to delegates from the *University of Tennessee Law Journal*, the meeting in Oxford was "one of the most enjoyable and beneficial experiences in the three-year history" of the conference and it was a "splendid success."[100]

The 1949 meeting of the Southern Law Review Conference was such a success that the conference returned to Oxford in 1954 for its eighth-annual meeting.[101] The 1954 conference was attended by nearly one hundred delegates from seventeen law schools.[102] The highlight of the conference was a keynote address given by the Honorable Felix Frankfurter, Associate Justice of the United States Supreme Court.[103] William N. Ethridge, Jr., former conference chairman and faculty advisor of the *Journal*, who in 1952 had been elected as an Associate Justice to the Mississippi Supreme Court, also spoke at the conference.[104]

Publication of the October 1954 issue marked a milestone for the *Journal*: the completion of the twenty-fifth volume. The

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[95] Transcript of Proceedings of the Third Annual Meeting of the Southern Law Review Conference, at iii (Mar. 25-26, 1949) (on file with the Department of Special Collections, J.D. Williams Library, University of Mississippi).

[96] *Id.* at 1-2.

[97] *Id.* at iv.

[98] *Id.* at 3.

[99] *Id.* at 75.

[100] George C. Thomas, Comment, *Southern Law Review Conference*, 20 TENN. L. REV. 763, 763 (1949).

[101] LANDON, *supra* note 10, at 88.

[102] *Proceedings of the Eighteenth Annual Meeting of the Junior Bar Section*, 25 MISS. L.J. 329, 340 (1953) [hereinafter *Eighteenth Annual Meeting*].

[103] *Id.* Justice Frankfurter was invited by Dean Robert J. Farley to be the principal speaker at the 1954 Law Day. LANDON, *supra* note 10, at 94.

[104] *Eighteenth Annual Meeting*, *supra* note 102, at 340.

Journal was now in its twenty-sixth year of uninterrupted publication and had a circulation of approximately 2,300 copies per issue.[105] Subscribers included the members of the Bar, students of the law school, and libraries throughout the world.[106] And because every lawyer in Mississippi received a copy of the *Journal* as part of their Bar membership, the *Journal*'s circulation was one of the largest in the country.[107] International subscribers included individuals and institutions in England, Saudi Arabia, South Africa, Argentina, Australia, Belgium, Germany, Mexico, and the Philippines.[108]

In 1958, a three-story extension was added onto the back of Lamar Hall, which meant, to the chagrin of preservationists, that the Dead House was torn down.[109] The *Journal* moved its office to the basement floor of Lamar (Farley) Hall, a location *Journal* members thought temporary.[110] Little did they know, the *Journal* would remain in this undesirable location for the next twenty years.

III. LAMAR (FARLEY) HALL: 1959–1978

The United States Supreme Court's decision in *Brown v. Board of Education* in May of 1954 ushered in a tense period at the University of Mississippi School of Law.[111] Dean Robert J. Farley and other members of the law faculty were scrutinized by segregationists for urging state leaders to accept the holding in *Brown*.[112] Professor William Patrick Murphy, the law school's

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[105] *Report of the Editorial Board of the Mississippi Law Journal*, 25 MISS. L.J. 338 (1954) [hereinafter *Report of the Editorial Board* 1954].

[106] *Id.* at 338-39.

[107] E-mail from John R. Bradley, Professor, University of Mississippi School of Law, to author (Sept. 8, 2010) (on file with author) [hereinafter E-mail from John R. Bradley].

[108] *Report of the Editorial Board* 1954, *supra* note 105, at 339.

[109] LANDON, *supra* note 10, at 91; *see also Report of the Editorial Board of the Mississippi Law Journal*, 30 MISS. L.J. 566 (1959) [hereinafter *Report of the Editorial Board* 1959].

[110] *Report of the Editorial Board* 1959, *supra* note 109, at 566.

[111] *See* LANDON, *supra* note 10, at 92-96; *see also* Charles W. Eagles, *"Thought Control" in Mississippi: The Case of Professor William P. Murphy*, 66 J. MISS. HIST. 151, 151-99 (2004).

[112] LANDON, *supra* note 10, at 91-96.

expert on constitutional law, received the most scrutiny of all the faculty.[113]

In the summer of 1961, the *Journal* was planning to publish a series of articles detailing Professor Murphy's dissertation at Yale on the Founding Fathers, the United States Constitution, and states' rights.[114] Murphy's thesis challenged the constitutional basis for the exercise of states' rights to nullify federal law.[115] Wanting to see the entire series published, but also aware that political forces in the state wanted to block its publication, Dean Farley urged John R. Bradley Jr., the *Journal*'s editor-in-chief in 1961, to accelerate publication of the Murphy series.[116] Unaware of the details motivating Dean Farley's concern, Bradley and the *Journal* expedited publication of the articles.[117]

Soon thereafter, in September of 1962, the Mississippi state senate passed a resolution calling on the university board of trustees to fire Murphy, and the board responded by insisting that Murphy not teach at the law school.[118] Weary of the conflict and uncertain about his job security, Murphy left in the fall of 1962 to join the faculty at the University of Missouri School of Law.[119] Only weeks after Murphy's departure, James Meredith integrated the University of Mississippi, and violence engulfed the campus, resulting in two deaths and occupation by federal troops for weeks to come. [120]

Despite the tension at the law school, and the racial turmoil in the state, the *Journal* was a thriving publication. Dean Joshua M. Morse III boasted in his 1963-64 report to the university board of trustees that the "Mississippi Law Journal is the fourth largest

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[113] *Id.*

[114] E-mail from John R. Bradley, *supra* note 107.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] LANDON, *supra* note 10, at 95.

[119] *Id.* at 96.

[120] *Id.* Professor Murphy died in September of 2007. The *Journal*'s fourth issue of Volume 77 (2008) contains articles commemorating Murphy's career, with special emphasis on his professorship at the University of Mississippi School of Law. *See* 77 MISS. L.J. 917, 917-56 (2008); *see also* Eagles, *supra* note 111. Professor Murphy's ouster from the University of Mississippi reached national headlines. *See Teacher, Target of Attacks, Resigns Post in Mississippi*, N.Y. TIMES, Aug. 6, 1962, at 22.

journal in order of circulation in the United States, having 2800 [sic] subscribers. The Law Journal reaches more readers than the Yale, Vanderbilt, Texas, or George Washington law publications."[121]

This period not only marked a high point in the *Journal*'s circulation, but there were also several particularly noteworthy *Journal* members during the 1960s. From 1962 to 1965, William Thad Cochran was a member of the *Journal*, serving as an articles editor in the 1964-65 academic year.[122] Cochran would later be elected to the United States House of Representatives in 1974 and to the United States Senate in 1978, where he continues to serve today.[123] Robert Conrad Khayat was a member of the *Journal* from 1964 to 1965.[124] Later, as a member of the University of Mississippi law faculty, Khayat would serve for a brief time as faculty advisor to the *Journal*.[125] In 1995, Khayat would become the fifteenth Chancellor of the University of Mississippi, a position he held until his retirement in June of 2009.[126] Overlapping with Chancellor Khayat on the *Journal* was Robert A. Weems, a member from 1965 to 1966 who served as index and review editor during that academic year.[127] Weems joined the University of Mississippi law faculty in 1977, and remains there today.[128] He has also served as faculty advisor to the *Journal*.[129] A

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[121] Joshua M. Morse III, *School of Law*, *in* ANNUAL REPORT OF THE CHANCELLOR OF THE UNIVERSITY OF MISSISSIPPI TO THE BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER LEARNING 107 (1964).

[122] *See* 36 MISS. L.J. masthead (1965); 35 MISS. L.J. masthead (1964); 34 MISS. L.J. masthead (1962). The reason for Cochran's lengthy membership on the *Journal*, 1962-65, was that during the 1963-64 academic year Cochran was on leave of absence from the *Journal* studying at Trinity College, University of Dublin, Ireland, on a Rotary Foundation Graduate Fellowship. *See* 35 MISS. L.J. masthead (1964); *see also Biography*, THAD COCHRAN, http://www.cochran.senate.gov/public/index.cfm/biography (last visited Apr. 29, 2012).

[123] *Biography*, *supra* note 122.

[124] *See* 37 MISS. L.J. masthead (1965); 36 MISS. L.J. masthead (1964).

[125] Khayat was faculty advisor to the *Journal* in 1970-71. *See* 42 MISS. L.J. masthead (1971); 41 MISS. L.J. masthead (1970).

[126] *Saying Goodbye: Friends Reflect on the Legacy of Robert Khayat*, UM LAW., Spring/Summer 2009, *available at* http://law.olemiss.edu/umlaw_mag/UMLAWYER SUMMER09/l_f_khayat.html.

[127] *See* 36 MISS. L.J. masthead (1965).

[128] *Faculty Directory*, UNIV. OF MISS. SCHOOL OF LAW, http://www.law.olemiss.edu/faculty_profiles/faculty_weems.html (last visited Apr. 29, 2012).

[129] *See generally* 81 MISS. L.J. masthead (2012).

contemporary of Weems, Guthrie T. (Guff) Abbott joined the *Journal* in 1965, serving as the case note editor during the 1965-66 academic year.[130] Abbott would later become a member of the University of Mississippi law faculty in 1968, and was the acting dean of the law school from 1985 to 1986.[131] Abbott too would serve as faculty advisor to the *Journal*.[132] Finally, Samuel M. Davis was a member of the *Journal* from 1968 to 1969, serving as editor-in-chief in 1969.[133] Davis later served as Dean of the University of Mississippi School of Law from 1997 to 2010.[134]

In 1967, the *Journal* launched a program that would eventually become the key to its financial viability. Through the Mississippi Briefing Service, the *Journal* delivered synopses of recent decisions of the Mississippi Supreme Court to subscribers of the service.[135] The *Journal* created the service primarily to generate more income for the *Journal*.[136] The *Journal* initially struggled to get its staff to take the briefing service seriously. To combat this problem, the *Journal* began notating the case briefs with the name of the *Journal* staff member who prepared the brief, a practice that continues today.[137] Although the service was a time-consuming venture, it successfully generated much-needed funds.[138] The briefing service operates today much as it did at its inception, with one exception being that the service now reports the decisions of the Mississippi Court of Appeals, in addition to the Mississippi Supreme Court.[139]

In February of 1969, foreshadowing a critical juncture in its future, the *Journal* received a disconcerting letter from George Van Zant, Executive Director of the Mississippi Bar Association. In the letter, Van Zant stated:

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[130] *See* 37 MISS. L.J. masthead (1965).

[131] *See Tribute to Guthrie T. Abbott*, 70 MISS. L.J. 489, 489-96 (2000).

[132] *Id.*

[133] *See* 40 MISS. L.J. masthead (1968); 39 MISS. L.J. masthead (1968).

[134] E-mail from Samuel M. Davis, Dean, University of Mississippi School of Law, to law school student body (Dec. 1, 2009) (on file with the *Mississippi Law Journal*).

[135] E-mail from Cliff Hodge, former professor, University of Mississippi School of Law, to author (Sept. 9, 2010) (on file with author).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *See Welcome to BriefServ*, BRIEFSERV, http://msbriefserv.com/ (last visited Apr. 15, 2012).

> As far as I can determine, the Mississippi State Bar is the only state bar in the country which subsidizes a law school journal. I firmly believe there is going to have to be a realignment in the financing of the journal with the university taking all or a significant part of it."[140]

The letter arrived at a time when the *Journal* was already dissatisfied with the subsidy it had been receiving from the Bar. The cost of publishing the *Journal* and providing it free of charge to each member of the Bar was beginning to cost more than the amount of money the Bar was providing for the service. For the time being, however, the *Journal*'s relationship with the Bar remained intact.

The *Journal*'s masthead in the Winter of 1969 included a particularly noteworthy name: Nausead L. Stewart.[141] Stewart was the first African American member of the *Journal*.[142] She would later become an active civil rights litigator in Mississippi, working alongside fellow University of Mississippi law graduates and civil rights luminaries, Reuben V. Anderson and Constance Slaughter-Harvey.[143] While African American students have since served in *Journal* leadership positions, the first being Kenneth G. Stamps in 1979,[144] and most recently Kristie Metcalfe in 2009-10,[145] the *Journal* has yet to elect an African American editor-in-chief.

In 1970, the *Journal* elected Hugh C. "Buzzy" Clayton editor-in-chief.[146] Buzzy Clayton's election marked the first time that a father and son had both been elected editor of the *Journal*.

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[140] Letter from George Van Zant, Executive Director of the Mississippi State Bar, to Jerry Langford, Business Manager of the *Mississippi Law Journal* (Feb. 10, 1969) (on file with the *Mississippi Law Journal*).

[141] *See* 41 MISS. L.J. masthead (1969).

[142] The author wishes to thank the following people for their assistance in identifying Ms. Stewart as the first African American member of the *Journal*: the Honorable William L. Waller, Jr., Chief Justice of the Mississippi Supreme Court; Kristie Metcalfe, Notes & Comments Editor, 2009-10; and Jake Curtis, Notes & Comments Editor, 2010-11.

[143] Reuben V. Anderson, *Reflections—My Experience at the University of Mississippi Law School*, 74 MISS. L.J. xxvii (2004); Constance Iona Slaughter-Harvey, *Law School Reflections*, 74 MISS. L.J. xxxv (2004).

[144] *See* 50 MISS. L.J. masthead (1979).

[145] *See* 79 MISS. L.J. masthead (2009).

[146] *See* 41 MISS. L.J. masthead (1970).

Buzzy's father Hugh N. Clayton served as the *Journal's* third editor-in-chief in 1930-31.[147] In March of 1980, in a small ceremony the same day as the formal dedication of the new law building, the new *Journal* suite was named the "Clayton Law Journal Suite" in honor of Hugh and Buzzy, and a plaque was hung that read "Dedicated In Honor Of The Only Father And Son Who Each Served As Editor-In-Chief Of the Mississippi Law Journal."[148] Tragically, Buzzy Clayton died of leukemia in July of 1972, just two years after his tenure as editor of the *Journal*.[149] While the *Journal* maintains the Clayton plaque today, its words are no longer true. In 1986, the *Journal* elected Walter J. Brand editor-in-chief,[150] the same accomplishment his father, Jack W. Brand, had attained in 1959.[151]

In 1971, the *Journal* made an unusual entry into the realm of national politics, sending a collective letter to President Richard Nixon urging the nomination of Judge Charles Clark to the United States Supreme Court.[152] Clark, a Mississippi native and graduate of the University of Mississippi School of Law, was a judge on the United States Court of Appeals for the Fifth Circuit.[153] But this was not the *Journal*'s only connection to the United States Supreme Court during this period, however. In the 1970s, two *Journal* members served as law clerks to Justices on the high court: Rhesa H. Barksdale, a member of the *Journal* from 1971 to 1972, who in 1990 would become a judge on the United States Court of Appeals for the Fifth Circuit, clerked for Associate Justice Byron White in 1972-73;[154] and William Wayne Drinkwater, a member of the *Journal* from 1973 to 1974, clerked for Chief Justice Warren E. Burger in 1976-77.[155] Barksdale and Drinkwater were not the first members of the *Journal* to clerk on

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147 LANDON, *supra* note 10, at 137.

148 *Id.*

149 140 CONG. REC. S7056-58 (daily ed. June 16, 1994) (statement of Sen. Thad Cochran), *available at* http://www.gpo.gov/fdsys/pkg/CREC-1994-06-16/html/CREC-1994-06-16-pt1-PgS34.htm.

150 *See* 56 MISS. L.J. masthead (1986).

151 *See* 30 MISS. L.J. masthead (1959).

152 Letter from *Mississippi Law Journal* collectively, to President Richard M. Nixon (Sept. 1969) (on file with the *Mississippi Law Journal*).

153 *Foreword*, 61 MISS. L.J. (1991).

154 LANDON, *supra* note 10, at 131.

155 LANDON, *supra* note 10, at 131.

the United States Supreme Court: Huey B. Howerton, Jr., editor-in-chief of the *Journal* in 1944-45 and faculty advisor to the *Journal* from 1947 to 1948, clerked for Associate Justice Hugo Black in 1951-52;[156] and Raymond L. Brown, a member of the *Journal* from 1961 to 1962, clerked for Associate Justice Thomas C. Clark in 1962-63.[157]

The 1970s also witnessed two students serve on the *Journal* who would later rise to high public office. Haley Barbour, the future chairman of the Republican National Committee (1993-97) and Governor of Mississippi (2003-11), was a member of the *Journal* in 1971-73;[158] and Roger Wicker, future member of the United States House of Representatives (1995-2007) and United States Senate (2007-present), was a member in 1974-75.[159] Thus, from 2007 to 2011, with Thad Cochran and Roger Wicker in the United States Senate and Haley Barbour as Governor, the most prestigious political offices in Mississippi were held by former members of the *Mississippi Law Journal.*

In 1972, the *Journal* published an article written by Jackson lawyer and *Journal* alumnus Lawrence J. Franck that would prove to be one of the most influential articles ever published by the *Journal.*[160] At the time of Franck's article, Mississippi trial practice was controlled by an "[a]ntiquated and ill-designed . . . hodge-podge of confusing, scattered statutes, court rules, and case decisions . . . ."[161] This was contrary to practice in federal court, where the federal rules of procedure provided extensive uniform rules for trial practice. The Bar had pressed the legislature to reform the civil rules but to no avail.[162] Franck's article, *Practice*

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[156] *Id.*

[157] *Id.* In addition to being the *Journal's* only members to serve as law clerks on the United States Supreme Court; Howerton, Brown, Barksdale, and Drinkwater are also the only graduates of the University of Mississippi School of Law to do so. *Id.*

[158] *See Governor Haley Barbour,* BGR GROUP, http://www.bgrdc.com/x-bios/bgr-barbour-h.html (last visited Apr. 15, 2012); *see also* 42 MISS. L.J. masthead (1971).

[159] *See* 45 MISS. L.J. masthead (1974); *see also About Roger*, ROGER WICKER, http://www.wicker.senate.gov/public/index.cfm?FuseAction=AboutRoger.Biography (last visited Apr. 29, 2012).

[160] Lawrence J. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972).

[161] *Id.* at 287.

[162] E-mail from Luther T. Munford, Jackson, Mississippi attorney, to author (Feb. 2, 2011) (on file with author).

and Procedure in Mississippi: An Ancient Recipe for Modern Reform, argued that the Mississippi Supreme Court had the inherent power to establish uniform rules of practice and procedure—without aid of the legislature.[163] In 1975, the Mississippi Supreme Court decided *Newell v. State* in which the court, citing Franck's *Journal* article, unanimously announced that it would "draw upon its inherent power to prescribe rules of procedure to facilitate the administration of justice in the courts throughout the state."[164] Accordingly, starting in 1981 and continuing today, the Court proceeded to adopt rules of practice and procedure for all the state's courts.[165]

But only a year after Franck's article, the *Journal* published an article that has been cited by courts and scholars more times than any other article published by the *Journal*. In *On the Nature of Strict Tort Liability for Products*, Professor John W. Wade, former *Journal* editor-in-chief (1933-34) and Dean of the Vanderbilt Law School (1952-71), identified the three now familiar categories of product liability claims: manufacturing defects, design defects, and failure to warn.[166] He also proposed that courts use a risk-utility test in design defect cases, a test that is now used by an overwhelming majority of United States courts.[167] Finally, the article set forth the now favored seven-factor strict liability test for determining whether a product is unreasonably dangerous.[168] Not surprisingly, Wade's article has been cited by state and federal courts in approximately 200 judicial opinions and countless articles, treatises, and case books.[169]

By 1974 the *Journal* required significant administrative and clerical assistance that it received from the full-time help of one of

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[163] Franck, *supra* note 160, at 287-88.

[164] 308 So. 2d 71, 76, 78 (Miss. 1975).

[165] *See* Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989).

[166] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841-42 (1973).

[167] For a recent survey of jurisdictions using the risk-utility test and affirming its use by an "overwhelming majority" of United States courts, see *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14-15 (S.C. 2010).

[168] Wade, *supra* note 166, at 837-38.

[169] Calculation based on author's research. Wade's article continues to be cited by courts today. *See, e.g.*, Schmidt v. Boardman Co., 11 A.3d 924, 940 (Pa. 2011); *see also* Gary Myers, *Dean John Wade and the Law of Torts*, 65 MISS. L.J. 29, 30 (1995).

the law school's secretaries.[170] Due to budget cuts, however, the law school informed the *Journal* that the organization would no longer be able to use the law school secretary.[171] In response, the *Journal* hired Ms. Sherry Moore in 1975 as the *Journal*'s first full-time administrative assistant.[172] In order to pay Ms. Moore's salary, the *Journal* appropriated the meager salaries it was paying the students on its editorial board.[173] The administrative assistant position became a *Journal* fixture until 2008 when the *Journal* would again operate without one.[174]

Also in 1974, the *Journal* established the *Mississippi Law Journal* Alumni Association.[175] The stated purpose of the alumni association was to maintain contact with *Journal* alumni and to provide funds for special projects.[176] Another purpose of the association was to help convince the Bar that increased funding was needed for the *Journal*.[177] Each association member paid ten dollars annually as dues.[178] An alumni newsletter, called "Footnotes," was published once per semester and sent to members of the association.[179] The *Journal* created an associate editor's position to administer the association and to be

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[170] Memorandum concerning *Mississippi Law Journal* Secretary (June 3, 1974) (on file with the *Mississippi Law Journal*).

[171] *Id.*

[172] Memorandum from Stanley Q. Smith, Business Manager, *Mississippi Law Journal*, to file (Nov. 13, 1979) (on file with the *Mississippi Law Journal*). The *Journal* employed Mrs. Billie B. Walshock as a part-time administrative assistant for a short time in 1974. Memorandum from E. Stephen Williams, Business Manager, *Mississippi Law Journal*, to Stephen W. Rosenblatt, Editor-in-Chief, *Mississippi Law Journal* (Sept. 18, 1974) (on file with the *Mississippi Law Journal*).

[173] Letter from Tom Collier, Editor-in-Chief, *Mississippi Law Journal*, to Dean Parham Williams, Dean of the University of Mississippi School of Law (June 30, 1975). The editorial board salaries were later reinstated out of *Journal* appropriations. Letter from H.M. Yoste, Jr., Editor-in-Chief, *Mississippi Law Journal*, to Luther Ott (Dec. 22, 1977) (on file with the *Mississippi Law Journal*).

[174] Letter from William Painter, Editor-in-Chief, *Mississippi Law Journal*, to *Mississippi Law Journal* Alumni (June 10, 1974) (on file with the *Mississippi Law Journal*).

[175] Letter from William Painter, Editor-in-Chief, *Mississippi Law Journal*, to Robert H. Hodges (June 10, 1974) (on file with the *Mississippi Law Journal*).

[176] Letter from William Painter, *supra* note 174.

[177] *Id.*

[178] *Id.*

[179] *Id.*

responsible for publication of the alumni newsletter, the collection of dues, and the organization of events with *Journal* alumni.[180]

The alumni association was replaced in November of 1978 by a similar entity named The *Mississippi Law Journal* Association, Inc.[181] The *Law Journal* association was primarily responsible for raising and investing funds to ensure financial support for the *Journal*'s operation.[182] The association included current student members of the *Journal* and interested former *Journal* members.[183] Control of the association was vested in the current editor-in-chief and a board of directors that consisted of past *Journal* editors-in-chief and business managers.[184] The association generated income from alumni dues, gifts, and donations. Thus, in 1978 the *Journal* was composed of two separate organizations: (1) the *Mississippi Law Journal*; and (2) the *Mississippi Law Journal* Association, Inc.

The *Law Journal* association was also responsible for a commercial venture, the *Mississippi Attorney's Desk Book*.[185] First published by the *Journal* in June of 1976, the desk book was a loose-leaf reference service containing the court rules for the Mississippi Supreme Court as well as the uniform and individual rules governing practice in Mississippi's federal district courts and the Fifth Circuit Court of Appeals.[186] The desk book also contained the uniform chancery, circuit, and county court rules and additional rules adopted by individual judges.[187] Student members of the law journal association, who published the desk book, supplemented it three times annually.[188] The association financed the desk book and, consequently, received the revenue

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[180] *Id.*

[181] CHARTER OF INCORPORATION OF THE MISSISSIPPI LAW JOURNAL ASSOCIATION, INC. (1978) (on file with the Office of the Mississippi Secretary of State) (bk. 249, at 521).

[182] *Id.*

[183] *Id.* at 523.

[184] *Id.*

[185] Memorandum from William N. Reed, Editor-in-Chief, *Mississippi Law Journal*, to Members of the Mississippi State Bar Association (Feb. 18, 1977) (on file with the *Mississippi Law Journal*); *see* MISSISSIPPI ATTORNEY'S DESK BOOK (2d ed. 1977). The first advertisement for *The Mississippi Attorney's Desk Book* appeared in the *Journal's* second issue of Volume 47 (1976). *See* 47 MISS. L.J. 171 (1976).

[186] *See* MISSISSIPPI ATTORNEY'S DESK BOOK, *supra* note 185.

[187] *Id.*

[188] *Id.*

from its sale. The *Journal* ceased publication of the desk book in the mid-1980s when a similar publication from West Publishing drove it out of business.[189]

In 1978, the *Journal* completed its time in Lamar (Farley) Hall with a celebration of the *Journal*'s fiftieth year of publication. On April 1st of that year, approximately eighty current and former members of the *Journal* met in Oxford as part of the annual spring law alumni weekend to celebrate the *Journal*'s longevity.[190] Mr. Hugh N. Clayton, who had witnessed almost all fifty years of the *Journal*'s existence, addressed the proud and gleeful gathering.[191]

IV. LAMAR LAW CENTER: 1978–2010

Entering its fifty-first year of existence, the outlook for the *Journal* was bright. In addition to publishing four issues every year, the *Journal* published the Mississippi Briefing Service and the *Mississippi Attorney's Desk Book*. In the summer of 1978, the *Journal* moved its office to the new state-of-the-art law building, the Lamar Law Center.[192] The *Journal* made the move to the new building gladly, as its previous office in the basement of Lamar (Farley) Hall had become dilapidated.[193] *Journal* members perceived the *Journal*'s initial allocation of space in the new building as inadequate, but after wrangling with law school administrators its space allocation was increased by 700 square feet.[194] In its spacious new headquarters, the *Journal* was able to provide individual offices to most of its editorial board.[195]

Despite the *Journal's* auspicious outlook after fifty years of publication, the *Journal*'s increasingly tenuous relationship with

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[189] *Id.*

[190] Letter from H.M. Yoste, Jr., Editor-in-Chief, *Mississippi Law Journal* to the Board of Bar Commissioners of the Mississippi State Bar (Apr. 24, 1978) (on file with the *Mississippi Law Journal*).

[191] *Id.*

[192] LANDON, *supra* note 10, at 136.

[193] University of Mississippi law professor, Deborah Hodges Bell, who was a member of the *Journal* when the law school moved into the Lamar Law Center, described the *Journal*'s previous office in Lamar Hall as a "ratty, dusty space in the basement." E-mail from Deborah Hodges Bell, Professor, University of Mississippi School of Law, to author (Sept. 9, 2010) (on file with author).

[194] *Id.*

[195] *Id.*

the Bar finally began to emerge. In the late 1970s certain members of the Bar began to seriously question the Bar's support of the *Journal*. One concern was simply that the cost of the *Journal* to the Bar was too high.[196] Another concern was that with the founding of the *Mississippi College Law Review* in 1978, it was unfair for the Bar to subsidize the law journal at one law school in the state but not at the other.[197] Finally, some members of the Bar thought that the *Journal*'s focus was no longer on the Bar but rather on publishing articles of national interest.[198]

At least in part because of these concerns, the Bar's annual appropriation to the *Journal* began decreasing, severely straining the *Journal*'s finances.[199] Further, although it was losing Bar funding, the *Journal* was still required to print and mail copies of its issues to every Bar member. As a result, the publication and mailing costs began to far exceed the Bar's annual appropriation to the *Journal*.[200]

It became apparent to both the Bar and the *Journal* that their official relationship was in jeopardy. Over a sixth-month period in 1980-81, the *Journal* met with members of the Bar to discuss alternative arrangements.[201] In the end, the Bar and the *Journal* reached an agreement whereby the *Journal* would no longer receive financial assistance from the Bar, and the *Journal*, in turn, would discontinue providing each member of the Bar with copies of the *Journal*.[202] The effective date of the agreement was

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[196] Letter from Ronnie L. Walton, Chairman of the Law School Liaison & Education Committee of the Mississippi Bar, to Law School Liaison & Education Committee Members (Jan. 24, 1980) (on file with the *Mississippi Law Journal*).

[197] *Id.*

[198] *Id.*

[199] Letter from LaVone Warren, Editor-in-Chief, *Mississippi Law Journal*, to Mississippi State Bar Members (Aug. 28, 1981) (on file with the *Mississippi Law Journal*); *see also* Mississippi Law Journal *to be Offered by Subscription Only*, MISS. LAW., Nov.-Dec. 1981, at 14.

[200] Mississippi Law Journal *to be Offered by Subscription Only*, *supra* note 199. As of October 1980, the bar appropriated $21,000 per year. For this sum, each of the 4500 members of the bar received a copy of the *Journal* for approximately $4.67 per volume; this compared with printing costs in excess of $7.50 per volume. Under the arrangement with the bar, therefore, the *Journal* was losing approximately $10,000 per year. *Mississippi Law Journal* Editorial Board Meeting Minutes (Oct. 9, 1980) (on file with the *Mississippi Law Journal*).

[201] Mississippi Law Journal *to be Offered by Subscription Only*, *supra* note 199.

[202] *Id.*

June 1, 1982.[203] As of that date, the *Journal* was to become a separate, independent entity, operating on a subscription basis only. After more than fifty years of support from the Bar, the *Journal* would have to survive on its own.

The *Journal* hoped that by operating on a subscription basis it would have the flexibility to adapt to the changing cost of printing and mailing. But because of its relationship with the Bar, never in its history had the *Journal* had to worry about attracting subscriptions. The agreement with the Bar gave the *Journal* six months to solicit subscription orders from members of the Bar. The subscription drive began in August of 1981.[204]

Fortunately, the subscription drive was a success, and by November of 1981 the *Journal* had already received over 650 subscriptions.[205] And less than a year later, in October of 1982, the *Journal* was able to proudly report to the Bar's law school liaison committee that the *Journal*'s financial condition had significantly improved since its split with the Bar.[206] The *Journal* had approximately 1100 subscriptions from members of the Bar, and with 300 more subscriptions the *Journal* would break even on printing costs, a feat that had become elusive in the final years of funding from the Bar.[207] The *Journal* had survived the split.

The first test for the now independent *Journal* came quickly when in 1983, Dr. Peter Wagner, University of Mississippi Vice Chancellor for Academic Affairs, proposed that the university should not give substantial weight to articles published in law reviews during the tenure and promotion process for members of the University of Mississippi law faculty.[208] Dr. Wagner believed that law reviews were inferior to other scholarly publications because they were student edited and not peer reviewed.[209] In response to the proposal, several law professors and members of

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[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] Memorandum from Parham Williams, Dean, University of Mississippi School of Law, to Law Faculty (Mar. 9, 1983) (on file with the *Mississippi Law Journal*); *see also* Letter from Mitchell Cowan, Editor-in-Chief, *Mississippi Law Journal*, to Dr. Peter E. Wagner, Vice Chancellor for Academic Affairs, University of Mississippi (June 24, 1983) (on file with the *Mississippi Law Journal*).

[209] Memorandum from Parham Williams, *supra* note 208.

the Bar explained to Dr. Wagner, a physicist by training, the nature and function of law reviews in the American legal system.[210] Dr. Wagner agreed to alter his proposal so that the university would consider articles written by University of Mississippi law faculty that were published in other law reviews, but not articles published in the *Journal* because "publication in our own law review . . . is subject to the problem of compromise."[211]

Having grown accustomed to publishing articles written by University of Mississippi faculty members, Dr. Wagner's amended proposal alarmed the *Journal*. The *Journal* perceived that the likely effect of Wagner's proposal would be to dry up this valuable source of scholarship. The *Journal* responded to the proposal with vigor and quickly sent letters to former editors-in-chief requesting that they write Dr. Wagner in opposition to his proposal.[212] It did not take long for letters to begin pouring into Dr. Wagner's office expressing displeasure with his proposal.[213] And on March 27, 1983, the General Assembly of the National Conference of Law Reviews passed a resolution resolving that "worthy publications by law professors in law reviews of accredited law schools be accorded substantial weight during the tenure and promotion process of such professors' universities."[214] Despite being astonished and impressed by the *Journal*'s dynamic response to his proposal, Wagner never altered his position. Nevertheless, he did not remain a University of Mississippi Vice Chancellor for long, and his successor did not share his views.[215] In the end, his policy had no real effect.[216]

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[210] *Id.*

[211] Letter from Mitchell Cowan, Editor-in-Chief, *Mississippi Law Journal*, to the Honorable William F. Winter (July 1, 1983) (on file with the *Mississippi Law Journal*).

[212] *Id.*

[213] Letters from former editors-in-chief of the *Mississippi Law Journal* to Dr. Peter Wagner, Vice Chancellor for Academic Affairs, University of Mississippi (various dates during 1983) (on file with the *Mississippi Law Journal*).

[214] Resolution from The National Conference of Law Reviews, Inc. (Mar. 27, 1983) (on file with the *Mississippi Law Journal*). The author was unable to confirm whether the *Journal* had a role in prompting the resolution, but the resolution's timing suggests that it probably did.

[215] E-mail from Guthrie (Guff) T. Abbott, Professor Emeritus, University of Mississippi School of Law professor, to author (Feb. 27, 2011) (on file with author).

[216] *Id.*

In addition to facing challenges alone, independence from the Bar also forced the *Journal* to become fully responsible for its own destiny. The *Journal* did not shy away from this new role, and in the 1980s and 1990s the *Journal* made several important decisions to reshape its internal operations and public identity.

In April of 1986, the *Journal* hired Peggy C. Nail as an administrative assistant.[217] Nail would go on to serve the *Journal* for the next twenty plus years and, in the process, became a key part of the *Journal*'s backbone. Nail passed away on June 5, 2008, after a battle with cancer.[218] She is remembered fondly by former members of the *Journal*. The Fall 2008 issue of the *Journal* was published in memory of Peggy Nail, "for her years of service to the *Mississippi Law Journal*."[219]

Also in 1986, the *Journal* joined its sister organization, the Mississippi Law Journal Association, Inc., in adopting bylaws and incorporating under the laws of the State of Mississippi.[220] Before it was incorporated, the *Journal* had an uncertain legal status as some form of unincorporated association. Incorporation had become necessary because by that time the *Journal* was not only independent from the Bar, it was also independent from the university, from which the *Journal* was receiving no financial support. The corporate status ensured the *Journal*'s autonomy from the university and reinforced its complete authority in purchasing procedures (e.g., choice of publisher).

In 1995, the *Journal* established the Robert C. Khayat Scholarship in honor of the *Journal* alumnus, faculty advisor to the *Journal*, and chancellor of the university.[221] The Khayat Scholarship continues to be awarded each spring to the most outstanding *Journal* member(s).[222]

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[217] Memorandum from *Mississippi Law Journal* Business Manager to file (Apr. 16, 1986) (on file with the *Mississippi Law Journal*).

[218] *Mrs. Peggy Carnahan Nail: Life Legacy*, WALLER FUNERAL HOME, http://www.wallerfuneralhome.com/sitemaker/sites/Waller2/obit.cgi?user=979_MNail11 (last visited Apr. 15 2012).

[219] *See generally* 78 MISS. L.J. (2008).

[220] *The Mississippi Law Journal, Inc.*, MISS. SEC'Y OF STATE: BUS. SERVS., https://business.sos.state.ms.us/corp/soskb/Corp.asp?144445 (last visited Apr. 30, 2012).

[221] *See generally Robert C. Khayat Scholarship Endowment*, 81 MISS. L.J. (2012).

[222] *See Awards*, MISSISSIPPI LAW JOURNAL, http://mississippilawjournal.org/about-us/awards/ (last visited Apr. 15, 2012).

That year also saw the board of directors of the *Mississippi Law Journal* Association, Inc. vote to create an endowment with The University of Mississippi Foundation.[223] The association transferred its assets to the endowment, and the association granted the foundation authority and responsibility for investing and managing the corpus of the endowment.[224]

On October 15, 1996, the *Journal* organized a ceremony to rededicate its office in the Lamar Law Center as the Clayton Law Journal Suite.[225] The event took place in the mall area of the law center, with Chancellor Robert C. Khayat and Acting Dean of the law school William M. Champion presiding.[226] The Journal unveiled a new bronze door plaque to memorialize Hugh and Buzzy Clayton.[227] The Clayton family and Senator Thad Cochran were among those who attended the ceremony.[228]

But thereafter in 1999, the *Journal* found itself in the unusual and unenviable position of being scrutinized by the University of Mississippi law faculty. In March of that year, the faculty unanimously passed a resolution recommending that the *Journal* change its membership selection process to make it easier for students with higher grades to become members of the *Journal* and harder for other students.[229] Specifically, the faculty proposed, among other things, the following: (1) the top ten percent of each second-year class automatically receive an invitation to join the *Journal* without participating in any competition or writing a case note; (2) the minimum GPA for students participating in the case note competition be raised; and

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[223] Mississippi Law Journal Association, Inc., Corporate Resolution to Establish the *Mississippi Law Journal* Endowment and to Transfer Funds (Sept. 24, 1993) (on file with the *Mississippi Law Journal*).

[224] *Id.*

[225] Memorandum from Scott R. Hendrix, Editor-in-Chief, *Mississippi Law Journal*, to University of Mississippi School of Law faculty members (Oct. 8, 1996) (on file with the *Mississippi Law Journal*).

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Letter from Michael H. Hoffheimer, Professor of Law, University of Mississippi School of Law, to David Shelton, Editor-in-Chief, *Mississippi Law Journal* (Mar. 26, 1999) (on file with the *Mississippi Law Journal*).

(3) the total number of students on the *Journal* be capped at fifty.[230]

At the time the faculty passed the resolution, it was the *Journal*'s practice to invite every law student with a certain minimum GPA to compete in a case note competition, the results of which determined *Journal* membership.[231] With minimal variation, this had been the *Journal*'s method of selecting its members since 1956, when the *Journal* first required each potential member to write a case note in addition to having a high scholastic average.[232] The faculty proposal in 1999 actually resembled the method that the *Journal* used in its early years to select members: until 1956, when the case note requirement was first established, students with a high scholastic average were automatically selected for membership, while students with lower grades could become members only by writing an acceptable case note.[233]

While the resolution and the resulting negotiations caused considerable strife between the faculty and *Journal* leaders, it ultimately led the *Journal* to adopt a variation of the faculty resolution that included the following: (1) the top fifteen students of each second-year class would automatically be offered membership on the *Journal*; (2) those fifteen students would still be required to write a case note; (3) all second-year students with a GPA of 2.8 or above would be invited to participate in a case note competition; and (4) there would be no limit on the number of *Journal* members.[234] With little deviation, the *Journal* employs this method today.[235]

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[230] *Id.* The faculty resolution also proposed that the *Journal* allow only one opportunity each year to gain membership on the *Journal* and that the case note competition for students with lower grades be subject to double-blind grading. *Id.*

[231] Memorandum from Trey Bourn, Editor-in-Chief, *Mississippi Law Journal*, to file (Apr. 18, 1999) (on file with the *Mississippi Law Journal*).

[232] *Report of the Editorial Board of the* Mississippi Law Journal, 27 MISS. L.J. 338, 338 (1956).

[233] *Report of the Student Editorial Board of the* Mississippi Law Journal, 20 MISS. L.J. 509, 510 (1949).

[234] Memorandum from Trey Bourn, *supra* note 231.

[235] The minimum GPA required for competing in the case note competition for membership was changed from 2.8 to 3.2 in 2004 when the law school changed the median for the first-year mandatory grading guidelines from 2.5 to 3.0. RESTATED BYLAWS OF THE MISSISSIPPI LAW JOURNAL, INC. amend. 5. The *Journal* has also since added a Bluebook editing exercise and the completion of an acceptable Mississippi case

Establishment of the *Journal's* endowment with the University of Mississippi Foundation in 1994 prompted speculation whether there was any continued purpose for the Mississippi Law Journal Association, Inc. Since the creation of the association in 1978, the journal was governed by two official entities: the association and the *Journal*. Sometime in the mid-1980s, however, both the board of directors for the Association and the board of trustees for the *Journal* became defunct due to inactivity.[236] This resulted in the *Journal* being operated for many years with no connection to its alumni.[237] This disconnect with *Journal* alumni, combined with independence from the Bar, also meant that the *Journal* was operating year-to-year with minimal continuity and no oversight.[238] To remedy this problem, the *Journal* decided in April of 2000 to merge the association into the *Journal* and create a single board of directors for the *Journal*. This board of directors, which continues to meet annually, is comprised of four *Journal* alumni, three student editors from the *Journal*, and one faculty advisor.[239] The board has the authority to conduct all the business of the *Journal*, including the election of future directors.[240]

The changes made by the *Journal* in the 1980s and 1990s, however, did not prevent it from publishing several notable articles during this period. In the midst of intense debate over public education in Mississippi, the *Journal* published two issues focused on the matter. The Fall 1988 issue was a Symposium on Education, and included a foreword written by Governor Ray Mabus, and an article written by former Governor William F. Winter.[241] The Winter 1993 issue focused on *United States v. Fordice*,[242] the United States Supreme Court decision holding that

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brief. *Membership*, MISSISSIPPI LAW JOURNAL, http://mississippilawjournal.org/about-us/membership/ (last visited Apr. 15, 2012).

[236] E-mail from Trey Bourn, Jackson, Mississippi attorney and *Journal* editor-in-chief in 1999-2000, to author (Sept. 8, 2010) (on file with author).

[237] *Id.*

[238] *Id.*

[239] RESTATED BYLAWS OF THE MISSISSIPPI LAW JOURNAL, INC. art. IV, § 3 (a)-(c).

[240] *Id.* at § 1.

[241] *See* Ray Mabus, *Foreword: Symposium on Education*, 58 MISS. L.J. 221, 221-22 (1988); William F. Winter, *Development of Educational Policy in Mississippi*, 58 MISS. L.J. 223 (1988).

[242] 505 U.S. 717 (1992).

the eight public universities in Mississippi had not sufficiently integrated.[243]

Another noteworthy issue during this period was that of Fall 1993, dedicated to the memory of Lucius Quintus Cincinnatus Lamar—Mississippi native, University of Mississippi law professor, and namesake of the law school's buildings from 1911 to 2010.[244] The year 1993 marked the centennial of Lamar's death. Over the course of his illustrious and varied career, Lamar served as ambassador to Russia for the Confederate States of America, a United States Representative and United States Senator, United States Secretary of the Interior, and an Associate Justice on the United States Supreme Court.[245] Much of the scholarship on Lamar has appeared in the pages of the *Journal*, including an article by distinguished University of Virginia law professor, Daniel John Meador.[246]

In 1996, the *Journal* published two articles by Associate Justices of the United States Supreme Court, Justice Clarence Thomas and retired Justice Byron White.[247] In October of 1995, Justice Thomas gave the "James McClure Memorial Lecture in Law" in Fulton Chapel on the University of Mississippi campus and the *Journal* published the lecture in the Spring 1996 issue.[248] Retired Justice White's article was published in a special issue dedicated to Professor Myres McDougal.[249] McDougal, a 1935

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[243] *See* John Quincy Adams, *Through the Looking Glass and What the Supreme Court Finds There: The Political Setting of* United States v. Fordice, 62 MISS. L.J. 263 (1993); Mary Ann Connell, *The Road to* United States v. Fordice: *What is the Duty of Public Colleges and Universities in Former* De Jure *States to Desegregate?*, 62 MISS. L.J. 285 (1993); Robert N. Davis, *The Quest for Equal Education in Mississippi: The Implications of* United States v. Fordice, 62 MISS. L.J. 405 (1993); William J. Dunaway & Russell W. Mills, United States v. Fordice*: A Summary of the Parties' Arguments*, 62 MISS. L.J. 361 (1993).

[244] Michael H. Hoffheimer, *Dedication*, 63 MISS. L.J. 1 (1993).

[245] *See* Michael H. Hoffheimer, *L.Q.C. Lamar 1825-1893*, 63 MISS. L.J. 5 (1993).

[246] *See* Michael H. Hoffheimer, *Holmes, L.Q.C. Lamar, and Natural Law*, 58 MISS. L.J. 71 (1988); Michael H. Hoffheimer, *L.Q.C. Lamar 1825-1893*, 63 MISS. L.J. 5 (1993); Daniel J. Meador, *Lamar to Posterity—A Centennial Memoir*, 63 MISS. L.J. 107 (1993).

[247] *See* Justice Clarence Thomas, U.S. Supreme Court, Keynote Address: James McClure Memorial Lecture in Law, 65 MISS. L.J. 463 (1996), Justice Byron S. White, *Tribute to Myres S. McDougal*, 66 MISS. L.J. 1 (1996).

[248] *See* Justice Clarence Thomas, U.S. Supreme Court, Keynote Address: James McClure Memorial Lecture in Law (Oct. 19, 1995), *in* 65 MISS. L.J. 463, 463-75 (1996).

[249] *See* Justice Byron S. White, *Tribute to Myres S. McDougal*, 66 MISS. L.J. 1, 1-8 (1996).

graduate of the University of Mississippi law school, taught at Yale Law School for over fifty years and was a pioneer in the fields of international law and space law.[250] Justice White was a student of Professor McDougal's at Yale.[251]

In the spring of 1999, the *Journal* became the first to publish the infamous *Dowd Report*, the report that led to baseball player Pete Rose's lifetime ban from Major League Baseball (MLB).[252] The report was the result of MLB's investigation into Rose's baseball betting activities in the 1980s and was prepared by John M. Dowd, Special Counsel to Major League Baseball Commissioner, Bart Giamatti.[253] University of Mississippi law professor Ronald J. Rychlak obtained the report for the *Journal*.[254]

Starting in 2002, the *Journal* began a partnership with the National Center for Justice and the Rule of Law (NCJRL), an entity within the University of Mississippi School of Law.[255] The NCJRL hosts an annual symposium on the Fourth Amendment that includes lectures given by many of the nation's foremost experts on the law governing search and seizure.[256] The *Journal*

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[250] *Id.* at 2.

[251] *Id.*

[252] John M. Dowd et al., *In the Matter of: Peter Edward Rose, Manager, Cincinnati Reds Baseball Club Report to the Commissioner*, 68 MISS. L.J. 911 (1999). In addition to the report itself, the *Journal* published the following: An introduction to the report written by University of Mississippi law professor Ronald J. Rychlak titled *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 MISS. L.J. 889; A statement from Bart Giamatti, Commissioner of Major League Baseball, on Pete Rose and the report, *Statement of Commissioner A. Bartlett Giamatti,* 68 MISS. L.J. 903; and, the actual agreement entered into between Rose and Giamatti banning Rose from Major League Baseball. *Agreement and Resolution, In the Matter of Peter Edward Rose*, 68 MISS. L.J. 907.

[253] *See* Dowd, *supra* note 252.

[254] The story of how Professor Rychlak obtained *The Dowd Report* for the *Journal* illustrates the proactive attitude that has resulted in many of the *Journal*'s most successful articles. After reading an article about Dowd's report in an issue of *Baseball Weekly*, Rychlak suspected that the report had not yet been published. Thereafter, Rychlak contacted Dowd, whom Rychlak had never met, and proposed that the *Journal* publish his report, and Dowd agreed. E-mail from Ronald J. Rychlak, Professor, University of Mississippi School of Law, to author (Feb. 17, 2011) (on file with author).

[255] The *Journal* published the first Fourth Amendment Symposium in the Fall 2002 issue. *See generally* 72 MISS. L.J. 1 (2002).

[256] *See Forthcoming Judicial Conferences and Webinars*, NAT'L CTR. FOR JUSTICE AND THE RULE OF LAW, http://www.olemiss.edu/depts/ncjrl/FourthAmendment/fai_judicialforthcoming.html (last visited Apr. 30, 2012).

dedicates one issue each year to publishing articles stemming from the symposium.

For many years before 2006, it became common for the *Journal* to operate without a profit.[257] Copying and postmarking the weekly briefing service represented one of the *Journal's* biggest expenses. To curb this expense, the *Journal* began distributing the briefing service by e-mail only in the fall of 2007.[258] Although the transition meant that a handful of subscribers without e-mail addresses could no longer receive the service, the *Journal* saved a substantial amount of money as a result. The *Journal* is solvent as a result of the revenue from this e-mail-only briefing service delivery. Continuing its efforts to reduce financial strain, the *Journal* reached out to *Journal* alumni for donations in 2007.[259] This fundraising effort resulted in the creation of the "Friends of the Mississippi Law Journal" list now published in each issue of the *Journal*.[260]

The *Journal*'s transition to an e-mail-only briefing service in 2006 was not its only recent move towards the Internet. In 2009, the *Journal* launched an Internet companion to its print issues called the "Mississippi Law Journal *Online*."[261] The internet site features short essays written by University of Mississippi faculty members and Mississippi practitioners, responses to articles printed in the *Journal*, and articles written by University of Mississippi law students.[262]

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[257] E-mail from Joshua Kyle, New York, NY attorney and *Journal* editor-in-chief in 2006-2007, to author (Dec. 9, 2010) (on file with author).

[258] Letter from Joshua S. Kyle, Editor-in-Chief, *Mississippi Law Journal*, to briefing service subscribers (Jan. 29, 2007) (on file with the *Mississippi Law Journal*).

[259] Letter from Alysson Mills, Editor-in-Chief, *Mississippi Law Journal*, to *Mississippi Law Journal* alumni (June 2007) (on file with the *Mississippi Law Journal*).

[260] *Friends of the Mississippi Law Journal* was first published in the Fall 2007 issue. *See generally* 77 MISS. L.J. (2007).

[261] The online publication was first called *MISSing Sources*. The name was changed to *Supra*, The Online Companion to the *Mississippi Law Journal* in 2011. Press Release, *Mississippi Law Journal*, News: The Online Journal Takes on a New Name (Sept. 7, 2011) (on file with the *Mississippi Law Journal*).

[262] *See About* Supra, MISSISSIPPI LAW JOURNAL, http://mississippilawjournal.org/supra/about-supra/ (last visited Apr. 15, 2012).

CONCLUSION: ROBERT C. KHAYAT LAW CENTER

In January of 2011, the University of Mississippi School of Law began classes in its new building, the Robert C. Khayat Law Center.[263] The *Journal*'s new office is on the second floor of the building, adjacent to the Moot Court Board's office. The *Journal*'s new office is its sixth in its ninety years of history, stretching back to the founding of its predecessor, the *Mississippi Law Review*.

In 2012, as it prepares to complete its eighty-first volume, the *Journal* is an independent and autonomous entity, receiving no funds from the university and with no official connection to the state bar association. And now with an online companion and an e-mail only briefing service, the *Journal* operates in ways unimaginable to its founders. These developments aside, those early student leaders still have much to say to the *Journal* leaders of today. As Joseph M. Howorth so eloquently remarked in closing the first volume of the *Mississippi Law Review*:

> The maiden volume of this publication has been successful. But, will the Law Students be content with this small success? I hope not! And I trust that in their young hearts a fire of enthusiasm will glow which will burst into flames of activity that will make the *Mississippi Law Review* the peer of its realm."[264]

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[263] *See generally* 81 MISS. L.J. 1 (2011).

[264] 1 MISS. L. REV. 90 (1923).

THE INCONVENIENT WORKER—CAN MISSISSIPPI'S PUBLIC POLICY EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE BE EXPANDED TO ENCOMPASS THE EXERCISE OF WORKERS' COMPENSATION RIGHTS?

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INTRODUCTION

Mississippi is currently one of only two states that fail to recognize a cause of action for the retaliatory discharge of an at-will employee solely for exercising his or her rights under its workers' compensation laws.[1] In contrast, the great majority of states—either by statute, judicial decision, or both—have afforded a worker protection from the harsh application of the employment-at-will doctrine by recognizing an important public policy exception for the exercise of workers' compensation rights.[2] This

[1] *See* Kelly v. Miss. Valley Gas Co., 397 So. 2d 874 (Miss. 1981); *infra* Part III. Georgia is the only other state that does not recognize a cause of action for retaliatory discharge when an employee is terminated for exercising workers' compensation rights in an at-will employment setting. *See* Evans v. Bibb Co., 342 S.E.2d 484 (Ga. Ct. App. 1986) (refusing to acknowledge retaliatory discharge for filing workers' compensation claim as public policy exception to GA. CODE ANN. § 34-7-1 (2008), which provides that "[a]n indefinite hiring may be terminated at will by either party"); *see also* Robins Fed. Credit Union v. Brand, 507 S.E.2d 185 (Ga. Ct. App. 1998) (same).

[2] LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 104.07 (Matthew Bender rev. ed. 2011) (listing jurisdictions recognizing retaliatory discharge); *see also*

Comment examines why Mississippi is again behind the times of contemporary American jurisprudence and explores whether Mississippi's narrow public policy exceptions to the common law employment-at-will doctrine could be expanded to include retaliatory discharge in the context of the Mississippi Workers' Compensation Act.[3]

First, this Comment is focused solely on at-will employees, as opposed to employment contracts for a fixed term.[4] Thus, a brief review of Mississippi's at-will-employment doctrine will be provided.[5] This will be followed by analysis of court decisions hinting at a departure from the doctrine and paving the way for the Mississippi Supreme Court's decision in *McArn v. Allied Bruce-Terminix Co.*,[6] which provides two narrow exceptions to the at-will rule, neither of which has yet to be expanded.[7] Next, this Comment will discuss the Mississippi Supreme Court's decision in *Kelly v. Mississippi Valley Gas Co.*,[8] which first refused to allow a private cause of action for wrongful discharge for filing a workers'

Theresa Ludwig Kruk, Annotation, *Recovery for Discharge From Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R. 4TH 1221 (1984 & Supp. 2006) (same). The landmark case of *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), was the first to allow the tort of retaliatory discharge for filing a workers' compensation claim, which Professor Larson noted as "odd that such a decision was so long in coming." LARSON, *supra*, § 104.07, at 104-57.

[3] Mississippi Workmen's Compensation Law, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -129 (2011)). In 1948, Mississippi became the last state to adopt a comprehensive workers' compensation law. *See generally* John C. Satterfield, *An Introduction to the Mississippi Workmen's Compensation Act*, 20 MISS. L.J. 27 (1948). The Act contains no remedy for retaliatory discharge and further states that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . ." MISS. CODE ANN. § 71-3-9 (2011).

[4] For a discussion on a retaliatory discharge action under contracts for a fixed term, see generally Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 210-11 (2010).

[5] *See infra* Part I.

[6] 626 So. 2d 603 (Miss. 1993).

[7] *See infra* Part II. For a recent-decision analysis of the *McArn* opinion, see Debbie Ho, Recent Decision, 64 MISS. L.J. 257, 267-73 (1994) (discussing *McArn*'s exceptions and future ramifications).

[8] 397 So. 2d 874 (Miss. 1981).

compensation claim,[9] as well as other cases in both federal and state courts which have since revisited the issue.[10] Finally, an in-depth analysis will be provided on whether current Mississippi law would recognize a retaliatory discharge cause of action through methods of statutory interpretation, expanding the current public policy exceptions to at-will employment provided in *McArn*, and reference to similar federal laws; or, in the alternative, whether legislative action is needed to rectify the effect of outdated decisions inconsistent with the overwhelming trend in other jurisdictions.[11]

I. MISSISSIPPI EMPLOYMENT-AT-WILL DOCTRINE

Contracts of employment for fixed terms provide workers with certain rights not available to those considered to be at-will.[12] For example, in addition to any express provisions creating contractual rights, contracts for fixed terms carry an implied covenant of good faith and fair dealing.[13] Thus, under a contract for a fixed term, in addition to any breach of contract claim that may arise, an employee may assert a retaliatory discharge claim in the event he or she is fired for "bad cause."[14] Most contracts for

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[9] *Id.* at 876-77. See Bob Baker, Recent Decision, 51 MISS. L.J. 575 (1981), for an in-depth analysis of the *Kelly* opinion and the court's reasoning that the legislative department, not the judiciary, should provide a wrongful discharge remedy.

[10] *See infra* Part III.

[11] *See* discussion *infra* Part IV.

[12] *See generally* LEX K. LARSON, UNJUST DISMISSAL § 10.25 (2011) (discussing employment at-will doctrine and exceptions in Mississippi).

[13] *See, e.g.*, Harris v. Miss. Valley State Univ., 873 So. 2d 970, 987 (Miss. 2004) (en banc) ("Every contract contains an implied covenant of good faith and fair dealing in performance and enforcement." (citing Morris v. Macione, 546 So. 2d 969, 971 (Miss. 1989))). A breach of this good-faith covenant is "bad faith," which can be "characterized by some conduct which violates standards of decency, fairness or reasonableness." *Id.* (quoting Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992)). Moreover, "[b]ad faith . . . requires a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'" *Id.* (quoting Bailey v. Bailey, 724 So. 2d 335, 338 (Miss. 1998) (en banc)).

[14] *E.g.*, LARSON, *supra* note 12, § 10.25. Of course, a prerequisite to any breach of contract or retaliatory discharge is that the agreement meets all the necessary elements of a contract for employment. These include (1) the parties' consent, (2) consideration for services rendered, and (3) employer authority over the employee. Walls v. N. Miss. Med. Ctr., 568 So. 2d 712, 715 (Miss. 1990) (en banc) (quoting Barragan v. Workers' Comp. Appeals Bd., 240 Cal. Rptr. 811 (Cal. Ct. App. 1987))

fixed terms must be in writing, providing the specific duration of the contract or that the employee may only be terminated for good cause.[15] Moreover, under the statute of frauds, any employment agreement for fifteen months or longer must be in writing to be an enforceable contract.[16] If not in writing, the employment will usually be considered at-will.[17] Even contracts deemed to be for a "lifetime" or "permanent" in nature will typically be construed as at-will employment.[18] However, there are exceptions where at-will employment may evolve into a contract that provides actionable rights to the employee, such as if the employee provides additional consideration in furtherance of labor for pay, the contract contains clauses expressing the employment is terminable only for good cause, or the employment contract incorporates employee-handbook provisions.[19] Under the latter exception, however, a disclaimer within the employee handbook or manual reinstating an at-will employment agreement often will override any asserted exception to the at-will doctrine.[20]

(noting Mississippi still adheres to common law rules governing validity of employment contracts).

[15] *See* LARSON, *supra* note 12, § 10.25.

[16] MISS. CODE ANN. § 15-3-1 (2003). However, an employee may plead equitable estoppel against his employer to overcome any statute of frauds defense to the employment contract. *See* Bowers Window & Door Co. v. Dearman, 549 So. 2d 1309, 1314 (Miss. 1989) (stating equitable estoppel requires change of position and detrimental reliance); *see also* Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997) (discussing use of promissory, as opposed to equitable, estoppel to defeat at-will status).

[17] LARSON, *supra* note 12, § 10.25.

[18] *Id.* (citing Rosen v. Gulf Shores, Inc., 610 So. 2d 366 (Miss. 1992)).

[19] *Id.* Examples of additional consideration may include relocating for an employment agreement considered to be "permanent" or promising not to prosecute a lawsuit against the employer. *Id.* (citing *Rosen*, 610 So. 2d 366). Alternatively, employee handbooks or manuals have often been used by plaintiffs' lawyers in support of a retaliatory discharge or breach of contract action, but with various levels of success. *Id.* (citing cases). For instance, even when there is no express provision integrating the handbook with the employment contract, one court held that a handbook can become part of the contract if it is distributed to all employees. Bobbitt v. Orchard, Ltd., 603 So. 2d 356, 361 (Miss. 1992). *But see* Brown v. Inter-City Fed. Bank for Sav., 738 So. 2d 262, 264 (Miss. Ct. App. 1999) (vague or ambiguous language in handbook cannot alter at-will status of employee).

[20] Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1088 (Miss. 1987) (interpreting language such as "[e]mployment rights not implied" and that company could

Thus, absent either a contract for a fixed term or some above mentioned modification, the typical employment contract is considered to be at-will. Since 1858,[21] Mississippi has adhered to the common law employment-at-will doctrine that provides "an employee may quit or be terminated . . . for good reason, bad reason, or no reason at all."[22] This language indicates there is no covenant of good faith and fair dealing read into at-will employment contracts.[23] Despite both judicial and legislative developments in national labor laws during the Great Depression and over the twentieth century,[24] Mississippi case law has remained relatively unchanged—"that a contract for employment for an indefinite period may be terminated . . . [by] either party."[25] In the 1981 opinion *Kelly v. Mississippi Valley Gas Co.*, discussed

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"terminate [employee] at any time" as a failure to waive employer's rights to unilateral termination). However, absent any express disclaimer to the contrary, certain employment provisions will become part of the contract. *See Bobbitt*, 603 So. 2d at 361-62.

[21] The Mississippi Supreme Court first adopted the at-will doctrine in *Butler v. Smith & Tharpe*, 35 Miss. 457, 464 (1858). *See also* Weyman Williams McCranie, Jr., Comment, *The Unfairness of Federal Preemption of State Law Exceptions to the Employment-at-Will Rule and the Need for a Uniform National Remedy for Wrongful Discharge*, 55 MISS. L.J. 517, 522 n.22 (1985) (discussing history of at-will doctrine in Mississippi).

[22] *E.g.*, Slatery v. Ne. Miss. Contract Procurement, Inc., 747 So. 2d 257, 259 (Miss. 1999) (citing *Brown*, 738 So. 2d at 264; *Bobbitt*, 603 So. 2d 356).

[23] *See* Hawkins v. Toro Co., No. 1:94CV25-B-D, 1995 U.S. Dist. LEXIS 21677, at *16 (N.D. Miss. Jan. 30, 1995); Young v. N. Miss. Med. Ctr., 783 So. 2d 661, 663 (Miss. 2001). *But see* Empiregas, Inc. v. Bain, 599 So. 2d 971, 976 (Miss. 1992) (holding that when employer terminates in bad faith, non-compete clause may not be enforced).

[24] *See, e.g.*, National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (2006)) (protecting laborers' right to unionize and upheld as constitutional in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)) (providing cause of action for discharge in retaliation for exercising rights under statute); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602 (codified at 29 U.S.C. § 623(a) (2006)) (providing remedy for wrongful discharge based on age); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 11(c), 84 Stat. 1590 (codified at 29 U.S.C. § 660(c) (2006)) (providing remedies against employer who terminates employee for reporting violations under statute); Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §703(a), 78 Stat. 241 (codified at 42 U.S.C. § 2000e-2(a) (2006)) (prohibiting discrimination based on race, color, religion, national origin, or sex).

[25] McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 606 (Miss. 1993) (quoting Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 874 (Miss. 1981)); *see infra* Parts II, III.

in Part III, when presented with an opportunity to carve an exception to at-will termination for a worker who files a good faith workers' compensation claim, the Mississippi Supreme Court refused to expand the at-will doctrine, stating the reasoning for the rule as follows:

> Any other theory than this would subject incautious persons—a class, it may be remarked, which includes a majority of mankind—into lifelong servitudes, and greatly fetter and embarrass the commerce of the world. Indeed, it may be said that any other theory is a moral and practical impossibility, and, if indulged in by the courts, could not be enforced in the ordinary concerns of life.[26]

This line of reasoning has been the subject of many attacks by scholarly commentators as failing to conform to modern realities of the workplace, and refusing to take into account the unforgiving effects the rule has on an employee who often times is left at the mercy of an employer.[27] Nevertheless, notwithstanding two narrow exceptions, the common law employment-at-will doctrine remains in force in Mississippi.[28]

II. *MCARN*—EXCEPTIONS TO EMPLOYMENT-AT-WILL

Throughout the next decade after the *Kelly* decision, the Mississippi Supreme Court expressed a willingness to venture

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[26] *Kelly*, 397 So. 2d at 875 (quoting Rape v. Mobile & O.R. Co., 100 So. 585, 587 (Miss. 1924) (en banc)). The court's reliance on the outdated *Rape* opinion seems perplexing, given that after *Rape* was decided a national movement promoting workers' rights followed. *See supra* note 24. Thus, the notion that "[a]ny other theory" is a "practical impossibility" and "could not be enforced" appears to be a smokescreen for judicial hesitancy to depart from longstanding precedent. *See Kelly*, 397 So. 2d at 875 (quoting *Rape*, 100 So. at 887). Moreover, *Rape* was decided well before the Mississippi Workers' Compensation Act was enacted, which was a central issue in *Kelly*. *See* MISS. CODE ANN. §§ 71-3-1 to -129 (2011).

[27] *See generally* Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75 (1995) (arguing common law premise of termination at-will fails in modern employment setting); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) (discussing ramifications of at-will employment on employees); *see also* Baker, *supra* note 9, at 580-81 & 581 n.35; Ho, *supra* note 7, at 259 n.13.

[28] *See infra* Part II.

from the "harsh rule" of the at-will doctrine. In *Shaw v. Burchfield*,[29] recognizing the recent criticism directed at the doctrine,[30] the court appeared to sympathize with employees, noting they are often in a more vulnerable position than their employers within an at-will employment setting.[31] Despite a finding that the employment contract in dispute expressly disclaimed any modification of at-will status, the court suggested that given the right set of facts, it "might well be charged to reconsider the at will termination rule."[32] In the 1987 case of *Perry v. Sears, Roebuck & Co.*,[33] the court again indicated a possible departure from precedent.[34] The court observed that other jurisdictions which allow public policy exceptions to the at-will doctrine have based their decisions "on the employee's (1) refusal to commit an unlawful act, (2) performance of an important public obligation or (3) exercise of a statutory right or privilege."[35] That same year, in what the Mississippi Supreme

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[29] 481 So. 2d 247 (Miss. 1985). The employee, an agent who had been under contract with several Farm Bureau Insurance Companies, was terminated after twenty-six years of service, was given only ten-days notice, and provided no reason for the termination. *Id.* at 249. The employee sued under a breach of contract claim, alleging that the employer had modified his at-will status via an informal policy of only terminating employees "for cause." *Id.* at 251, 253.

[30] The court cited a list of academic articles attacking the at-will doctrine as no longer consistent with modern employment expectations. *Id.* at 253-54 n.1.

[31] *Id.* at 254 ("[W]e may not remain insensitive to the fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job.").

[32] *Id.* The court said that such a situation might arise if there were no express employment contract and the employer calls upon the state to determine appropriate grounds for termination. *Id.*

[33] 508 So. 2d 1086 (Miss. 1987).

[34] *Id.* at 1089 (acknowledging that Mississippi was in the minority of states that do not provide a public policy exception to the at-will termination rule). However, in affirming the dismissal of the employee's wrongful discharge claim, the *Perry* court refused to adopt the theory that at-will employment carries with it an implied covenant of good faith and fair dealing, a breach of which would give rise to a wrongful discharge claim. *Id. But see id.* at 1090 (Robertson, J., concurring) (expressing willingness to imply covenant of good faith into employment contracts).

[35] *Id.* at 1089 (majority opinion) (citation omitted). It is noteworthy that the court mentions an employee's exercise of statutory rights as a public policy exception found in other jurisdictions. A classic example of this exception is the exercise of rights

Court later called a "prophetic *Erie*-guess,"[36] a federal district court became the first court applying Mississippi law to recognize an exception to the at-will doctrine.[37] The federal court in *Laws v. Aetna Finance Co.*, basing its reasoning on both *Shaw* and *Perry*,[38] held that under Mississippi law, an employee who alleges his termination was motivated by refusing to engage in illegal acts on behalf of his employer may bring a wrongful discharge claim.[39]

Six years later, the Mississippi Supreme Court affirmed that *Erie*-guess in implementing two narrow public policy exceptions to the employment-at-will doctrine.[40] In *McArn v. Allied Bruce-Terminix Co.*, the employee alleged he was fired for notifying the State Agricultural Department that his employer was falsifying chemical reports and lying to customers regarding their termite treatment—both crimes under Mississippi law.[41] After reviewing a line of cases which suggested some departure from the at-will

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created under applicable workers' compensation laws, a public policy exception recognized by forty-eight states. *See supra* note 2 and accompanying text.

[36] DeCarlo v. Bonus Stores, Inc., 989 So. 2d 351, 355 (Miss. 2008) (en banc) (emphasis added), *answering certified questions from* 512 F.3d 173 (5th Cir. 2007).

[37] Laws v. Aetna Fin. Co., 667 F. Supp. 342, 348 (N.D. Miss. 1987). Judge Davidson of the Northern District cited the *Kelly* opinion for the proposition that although the Mississippi Supreme Court would be hesitant to expand statutorily created law, i.e., the Mississippi Workers' Compensation Act, the employment-at-will doctrine is judicially created and, thus, may be modified by case law. *Id.* at 345-46.

[38] *Id.* at 346 (citing *Perry*, 508 So. 2d 1086; Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985)). Judge Davidson reasoned that both the *Shaw* and *Perry* decisions might be sending a "signal that the Mississippi court is leaving the possibility of amending the termination at will rule open for a suitable case in which to modify the harsh and unequivocal nature of the rule." *Id.*

[39] *Id.* at 346-47. The court held that as the employee alleged he was fired for refusing to violate federal and state lending law, his wrongful discharge claim fell within the newly created public policy exception. *Id.* at 349.

[40] *See* McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993). It is interesting to note that following the *Laws* decision, yet just one year before *McArn*, the Mississippi Supreme Court touched on the issue of at-will-employment again, but did not mention the *Laws* exception for refusing to participate in illegal acts. *See* Bobbitt v. Orchard, Ltd., 603 So. 2d 356, 357 (Miss. 1992) (holding that, absent express language to the contrary, employee manual setting forth termination procedures becomes part of employment contract).

[41] *McArn*, 626 So. 2d at 605-06. The crimes alleged were violations of MISS. CODE ANN. § 97-19-39, which makes receiving money under false pretenses a felony, and MISS. CODE ANN. § 69-23-19 (repealed 1997), which makes violating state pest control regulations a misdemeanor. *McArn*, 626 So. 2d at 606.

doctrine may be necessary, the court found that the employee had stated a recognizable cause of action.[42] The court held that as a matter of public policy, employees terminated for (1) refusing to participate in illegal acts of the employer or (2) reporting illegal acts of the employer may assert a wrongful discharge claim despite any at-will employment status.[43]

However, since *McArn*, both state and federal courts have been hesitant to expand its two "narrow" exceptions. For instance, although it has often been cited that every "contract[] contain[s] an implied covenant of good faith and fair dealing" in performance,[44] the Mississippi Supreme Court has repeatedly refused to read this covenant into employment-at-will contracts,[45] as the validity of at-will terminations are "not to be viewed through a good faith lens."[46] These holdings continue to bar any

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[42] *McArn*, 626 So. 2d at 606-07. The court "le[ft] for another day" the issue of whether punitive damages would be available in such a cause of action. *Id.* at 608. That day came in *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 543-44 (Miss. 1996) (holding that violations of the *McArn* exceptions constitute independent torts for which punitive damages are recoverable, subject to purview of trial court).

[43] *McArn*, 626 So. 2d at 607. The court seemed to emphasize, however, that the two "narrow exceptions" to the at-will doctrine should be "limited" in their extent. *Id.* For a discussion on how *McArn* will impact future jurisprudence within Mississippi, see Ho, *supra* note 7, at 269-73 (implying correctly that *McArn* may have no effect on the *Kelly* decision, as *Kelly* involved an employee's exercise of statutory rights, as opposed to illegal activities).

[44] *E.g.*, Morris v. Macione, 546 So. 2d 969, 971 (Miss. 1989) (citations omitted). For a definition of what may constitute a breach of good faith, i.e., bad faith, see *supra* note 13 and accompanying text.

[45] *See* Young v. N. Miss. Med. Ctr., 783 So. 2d 661, 663 (Miss. 2001); Hartle v. Packard Elec., 626 So. 2d 106, 110 (Miss. 1993); *see also* Hawkins v. Toro Co., No. 1:94CV25-B-D, 1995 U.S. Dist. LEXIS 21677, at *16 (N.D. Miss. Jan. 30, 1995) ("[A]t-will employment relationships are not governed by an implied covenant of good faith and fair dealing." (quoting *Hartle*, 626 So. 2d at 110)).

[46] Kayoma v. Delta Health Ctr., No. 4:05CV257-EMB, 2006 U.S. Dist. LEXIS 85408, at *7-8 (N.D. Miss. Nov. 22, 2006) (recognizing that to read an implied covenant of good faith into at-will contracts would abrogate common law precedent that employer may terminate for "good, bad, or no reason" (citing Harris v. Miss. Valley State Univ., 873 So. 2d 970, 986 (Miss. 2004) (en banc))); *see also* Miranda v. Wesley Health Sys., LLC, 949 So. 2d 63, 68 (Miss. Ct. App. 2006) (en banc) (same).

tort action for wrongful discharge based on such an implied covenant of good faith in an at-will employment setting.[47]

Similarly, a line of federal cases emerging post-*McArn* has given its holding a plain meaning interpretation—that the exceptions recognized apply only to illegal acts that amount to crimes under state or federal law.[48] Although many arguments have been made urging courts to interpret "illegal acts" in a broader sense,[49] or that new public policy considerations should be recognized,[50] none have been successful. For example, the *McArn* exceptions do not expand to include civil violations of an employer,[51] violations of state or federal environmental law,[52] or

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[47] *Young*, 783 So. 2d at 663-64 (affirming circuit court dismissal of claim for wrongful discharge based on good faith covenant as failing to state a claim upon which relief may be granted).

[48] Although the *McArn* opinion references "illegal acts," and did not expressly limit the exceptions to criminal acts, other decisions have nonetheless interpreted its holding as applicable only to activities that "involve criminal illegality." *See* Wheeler v. BL Dev. Corp., 415 F.3d 399, 404 n.4 (5th Cir. 2005) (quoting Howell v. Operations Mgmt. Int'l Inc., 77 F. App'x 248, 251-52 (5th Cir. 2003) (per curiam)). This reasoning appears to derive from not only the facts of *McArn*, which did involve criminal activity, *see supra* note 41, but also from the court's statement of the issue on appeal within its opinion, which was phrased "participate in criminal activity." *McArn*, 626 So. 2d at 604.

[49] *See Howell*, 77 F. App'x at 251-252 (finding illegal acts do not include OSHA violations); Bruno v. RIH Acquisitions MS I, LLC, 530 F. Supp. 2d 819, 824-25 (N.D. Miss. 2008) (stating violation of environmental laws, without criminal sanctions, do not fall within *McArn*'s parameters).

[50] *See* Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25 (Miss. 2003) (en banc) (holding no public policy exception for employee discharged for exercising workers' compensation rights); discussion *infra* Part III; *see also* Medina v. Mims Oil Co., No. 4:04CV236-P-B, 2005 U.S. Dist. LEXIS 46994, at *3 (N.D. Miss. July 8, 2005) (refusing to create new public policy exception where employee terminated to prevent recovery of employer-provided health benefits).

[51] *See Bruno*, 530 F. Supp. 2d at 824. The plaintiff in *Bruno* alleged his employer ordered him to dispose of a bucket of grease into a lake, which could result in civil sanctions. *Id.* Although the grease was in fact dumped in the lake, which the court acknowledged may also result in criminal fines, the court nonetheless found plaintiff's wrongful discharge claim without merit as the act was not reported to authorities nor did plaintiff's "weak opposition" to the dumping amount to "refusing to participate in an illegal act." *Id.* (citing *McArn*, 626 So. 2d at 607). The Mississippi Court of Appeals is the highest Mississippi state court to imply that civil violations do not fall within *McArn*'s public policy exceptions. *See* Hammons v. Fleetwood Homes of Miss., Inc., 907 So. 2d 357, 360 (Miss. Ct. App. 2004) (noting that a prerequisite of *McArn*'s exceptions is that "the acts complained of warrant the imposition of criminal penalties, as opposed to mere civil penalties" (citing Howell v. Operation Mgmt. Int'l Inc., 161 F. Supp. 2d 713, 719 (N.D. Miss. 2001))).

regulatory violations, such as filing a complaint with the Occupational Safety and Health Administration (OSHA).[53] Firing an employee so they will not be eligible for employer-provided health benefits appears to be permissible under Mississippi law as well.[54] Reporting alleged criminal activity of the employer which does not actually amount to a crime also will not suffice, as it is immaterial if the employee reasonably believed the activity to be

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[52] *Bruno*, 530 F. Supp. at 824. The disposal of the grease in the lake violated both state and federal environmental laws, something the court distinguished from criminal penalties. *Id.*; *see also Howell*, 77 F. App'x at 251 n.4 (noting although plaintiff's alleged discharge for reporting environmental regulations was procedurally barred on appeal, it still would not fall within *McArn*'s exceptions).

[53] *Howell*, 77 F. App'x at 251-52. The employee in *Howell* filed several complaints with OSHA regarding safety violations occurring at his employer's water treatment plant. *Id.* at 249. After investigation, OSHA found no regulations were violated. *Id.* The employee was suspended without pay and later filed a wrongful discharge claim, alleging that his termination for reporting alleged OSHA violations was in violation of state public policy. *Id.* The Fifth Circuit affirmed the dismissal of the complaint, holding that *McArn*'s exceptions do not expand to include regulatory violations that do not amount to criminal acts. *Id.* at 252. It should be noted that part of the court's reluctance to carve out an exception for OSHA complaints stems from federal law that OSHA itself may already take action against an employer who terminates employees for reporting violations, thus rendering state law unnecessary. *See* 29 U.S.C. § 660(c) (2006); *Howell*, 77 F. App'x at 252 (citing § 660(c)).

[54] *Medina*, 2005 U.S. Dist. LEXIS 46994, at *3. In a short, yet somewhat surprising opinion, the court held that the plaintiff failed to state a claim for wrongful termination on the basis that she was fired to preclude her from recovering health benefits under an employer-provided plan. *Id.* The court stated that it does not have authority to make new law in Mississippi, and that it should be left up to the Mississippi legislature to provide such a public policy exception to the at-will doctrine. *Id.* This reasoning is inconsistent with the Northern District of Mississippi's opinion in *Laws v. Aetna Finance Co.*, 667 F. Supp. 342 (N.D. Miss. 1987), which recognized a public policy exception to Mississippi law six years prior to the Mississippi Supreme Court's exceptions in *McArn*. *Laws*, 667 F. Supp. at 348-49. The court in *Laws* had no similar concerns for creating Mississippi law, as "the terminable at will doctrine is a judicially created one and can thus be modified by the judiciary." *Id.* at 345. Moreover, the notion that an employee may be discharged to preclude recovery of employer-provided health benefits is strikingly analogous to the scenario that an employee may be discharged for exercising workers' compensation rights. Although not mentioned in the *Medina* opinion, it is plausible that the language in *Kelly v. Mississippi Valley Gas Co.*, leaving any workers' compensation exception up to the legislature, had an influence on *Medina*'s holding. *See* Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981); discussion *infra* Part III.

illegal.[55] If the acts reported are not criminal in nature, then no wrongful discharge cause of action will be recognized.[56]

Given a recent chance to materially expand the at-will exceptions, the Mississippi Supreme Court, on certification from the United States Court of Appeals for the Fifth Circuit, stopped short of creating any new public policy that may give rise to a wrongful discharge claim.[57] In *DeCarlo v. Bonus Stores, Inc.*,[58] the court held that discharge in retaliation for reporting a co-employee's illegal acts, which relate to the employer's business, is actionable under *McArn*.[59] However, the court reiterated that it was not expanding existing law but simply clarifying existing precedent.[60] The court also refused to impose individual liability for wrongful discharge other than that liability imposed on the employer.[61] Thus, eighteen years after their inception, *McArn*'s narrow exceptions remain undisturbed. In fact, adding insult to plaintiffs' injuries, there has been relatively little dicta by any courts expressing a willingness to expand *McArn*, signaling to future employees an uphill battle awaits absent any allegations of criminal activity on behalf of the employer.[62]

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[55] *See* Wheeler v. BL Dev. Corp., 415 F.3d 399, 404 (5th Cir. 2005) (holding that *McArn* requires more than "reasonabl[e] belie[f]" that employer activities are illegal); Drake v. Advance Constr. Serv., Inc., 117 F.3d 203, 203-04 (5th Cir. 1997) (noting that the employer's acts, albeit "unprofessional or immoral," did not amount to criminal activity (quoting Drake v. Advance Constr. Servs., Inc., No. 1:95CV177-JAD, 1996 U.S. Dist. LEXIS 21435, at *4 (S.D. Miss. Aug. 23, 1996))).

[56] *See, e.g.*, *Wheeler*, 415 F.3d at 404.

[57] *See* DeCarlo v. Bonus Stores, Inc., 989 So. 2d 351, 353-54 (Miss. 2008) (en banc), *answering certified questions from* 512 F.3d 173 (5th Cir. 2007).

[58] 989 So. 2d 351.

[59] *Id.* at 357. The employee reported to a superior co-employee possible illegal conduct of both his employer and another co-employee. *Id.* at 352.

[60] *Id.* at 358. The court based its reasoning on its prior decision in *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996), which also held that employees who report illegal acts of co-employees could bring a wrongful discharge claim. *DeCarlo*, 989 So. 2d at 355-58.

[61] *DeCarlo*, 989 So. 2d at 358-59. The employee also sued the co-employee whom he reported the activities to, alleging the co-employee was in part responsible for his termination. *Id.* at 352. The court found "nothing in *McArn* or its progeny" which would support individual liability in a wrongful discharge action. *Id.* at 358.

[62] *See* Senter v. Cingular Wireless, LLC, No. 1:05CV100, 2006 U.S. Dist. LEXIS 25627, at *7-11 (N.D. Miss. Feb. 10, 2006). The employee in *Senter* reported alleged trespassing by suspicious customers on the premises to police, who did not make any arrests, and alleged she was terminated as a result. *Id.* at *2. Although the court stated

III. NO PUBLIC POLICY EXCEPTION FOR EXERCISE OF WORKERS' COMPENSATION RIGHTS

Throughout the development of a possible departure from the strict at-will employment rule—eventually leading to *McArn*'s narrow exceptions—Mississippi courts have remained steadfast in holding that an employee who is terminated for exercising his or her rights under the Mississippi Workers' Compensation Act may not state a claim for wrongful discharge.[63] In the seminal case of *Kelly v. Mississippi Valley Gas Co.*,[64] an employee suffered a work related injury for which he filed a good-faith claim with the Mississippi Workmen's Compensation Commission.[65] The employee alleged that after filing the claim, he was threatened by his employer to either dismiss the claim or face termination as a consequence.[66] Refusing to withdraw the claim, the employee was terminated and subsequently brought an action for wrongful discharge against the employer.[67] The employee urged the court to adopt a public policy exception to the at-will doctrine that would allow a cause of action for retaliatory discharge in the event an

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the employee's claim did not fall within *McArn* because she had not reported actual criminal activity, it implied that had the conduct of the customer in fact turned out to be illegal, the "Mississippi Supreme Court might well conclude that the public policy concerns raised by *McArn* justified extending the doctrine to such a situation." *Id.* at *8. For a discussion on how *McArn* may affect future plaintiffs, see Ho, *supra* note 7, at 269-73.

[63] *See infra* notes 74-82 and accompanying text.

[64] 397 So. 2d 874 (Miss. 1981). One year prior to *Kelly*, the Fifth Circuit was first presented with the issue of retaliatory discharge in the context of exercising rights under the Mississippi Workers' Compensation Act. *See* Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980). After a survey revealing a jurisdictional split on the issue, the Fifth Circuit reasoned that Mississippi would likely follow the lead of states in close proximity, which at the time did not recognize a cause of action. *Id.* at 214-15 (citing cases from Alabama, North Carolina, and Florida). Notably, all of the holdings relied upon by the Fifth Circuit are no longer good law and have been overruled by statute. *See* ALA. CODE § 25-5-11.1 (LexisNexis 2007) (recognizing retaliatory discharge in context of workers' compensation rights in Alabama); FLA. STAT. ANN. § 440.205 (West 2002); N.C. GEN. STAT. § 95-240 (2009).

[65] *Kelly*, 397 So. 2d at 874. The plaintiff was J.C. Kelly, an employee of defendant Mississippi Valley Gas Company. *Id.*

[66] *Id.*

[67] *Id.*

employee is fired solely for filing a good-faith workers' compensation claim.[68]

While acknowledging that many states have similar public policy exceptions, the court pointed out that in the majority of those jurisdictions, applicable statutory provisions sanction discharge for the exercise of workers' compensation rights.[69] Since the Mississippi Workers' Compensation Act does not expressly specify a remedy for retaliatory discharge,[70] the court reasoned that any such modification is better left for the legislature.[71] Although conceding that the plaintiff's argument had "considerable appeal," in a self-described exercise of judicial restraint, the court emphasized that any public-policy exception to the at-will doctrine or any amendments to the Workers' Compensation Act must come exclusively from the legislative branch.[72] Providing apparent guidance, the court cited a Texas

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[68] *Id.* At the time of *Kelly*, as *McArn*'s exceptions were still over a decade away, Mississippi rigidly followed the common law rule that at-will employment means there may be "good reason, a wrong reason, or no reason for terminating the employment contract." *Id.* at 875 (citations omitted); *see supra* note 22 and accompanying text.

[69] *Kelly*, 397 So. 2d at 875 & n.1; *see also* Leach v. Lauhoff Grain Co., 366 N.E.2d 1145, 1147 (Ill. App. Ct. 1977) (finding public policy established by 1975 amendment made it unlawful for employer to discharge for exercising rights under statute); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding threat of discharge is "device" under workmen's compensation laws, which prohibit any "device" used by employer to abrogate liability).

[70] *Kelly*, 397 So. 2d at 875; *see also* MISS. CODE ANN. § 71-3-9 (2011) ("The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . .").

[71] *Kelly*, 397 So. 2d at 876-77 ("The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature." (quoting Hamner v. Yazoo Delta Lumber Co., 56 So. 466, 490 (Miss. 1911))).

[72] *Id.* The court stressed that separation of powers mandated by the Mississippi Constitution cautioned judicial restraint against modifying a seemingly unambiguous statute on public policy grounds. *See* MISS. CONST., art. I, § 1. This reasoning is inconsistent with other jurisdictions that have judicially recognized wrongful discharge for exercising workers' compensation rights despite no express statutory provision. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) (deciding case with events that occurred before a 1975 amendment expressly allowed cause of action). The court in *Kelsay* stated that allowing an employer to discharge an employee solely for filing a workers' compensation claim:

> effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to

statute as a plausible framework from which any future amendments could be derived.[73]

Since the *Kelly* decision in 1981, notwithstanding *McArn*'s developments to the at-will doctrine, there has been relatively little case law revisiting this issue. The holdings in these few cases have been similar—until the legislature acts, *Kelly* remains the law in Mississippi.[74] Federal courts—despite one previous successful "*Erie*-guess" construing the Mississippi employment at-will doctrine[75]—have been hesitant to create any new public policy for exercising workers' compensation rights, instead acquiescing to state courts for any changes in the law.[76] The Mississippi

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> the public policy as expressed in the Workmen's Compensation Act. We cannot believe that the legislature, even in the absence of an explicit proscription against retaliatory discharge, intended such a result.

Id. at 357.

[73] *Kelly*, 397 So. 2d at 877 n.2. The Texas statute provided in pertinent part:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

Id. (quoting TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (West Supp. 1978) (repealed 1993), *recodified at* TEX. LAB. CODE ANN. § 451.001 (West 2006)).

[74] *See, e.g.*, Washington v. Woodland Vill. Nursing Home, 25 So. 3d 341, 358 (Miss. Ct. App. 2009) (en banc) ("While *McArn* is authority for the judiciary's power to modify the common law, Mississippi's Workers' Compensation Law is a legislative creation . . . ." (citing MISS. CODE ANN. § 71-3-1 (2000))).

[75] *See* Laws v. Aetna Fin. Co., 667 F. Supp. 342 (N.D. Miss. 1987) (allowing wrongful discharge action if employee is terminated for refusing to participate in illegal acts on behalf of employer); McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603 (Miss. 1993) (recognizing exception in *Laws* as actionable under Mississippi law); *supra* notes 37-43 and accompanying text.

[76] Pipkin v. Piper Impact, Inc., 70 F. App'x 760 (5th Cir. 2003) (per curiam). The plaintiff in *Pipkin* sought a retaliatory discharge claim for termination allegedly stemming from filing a claim under the Mississippi Workers' Compensation Act. *Id.* at 761-62. Refusing to certify the question, the Fifth Circuit, relying on *Kelly*, dismissed his cause of action, stating that Mississippi has "indicated that it was within the

Supreme Court's most recent decision on point came in 2003, in the brief opinion of *Buchanan v. Ameristar Casino Vicksburg, Inc.*[77] Under similar facts as *Kelly*, the *Buchanan* court again refused to adopt a public policy exception allowing a cause of action for an employee terminated for filing a workers' compensation claim.[78] The court held that since the employee had not alleged termination for either refusing to participate in illegal acts or for reporting illegal acts of the employer, the employee did not state a cause of action as recognized under *McArn*.[79] It is notable that the two justices dissenting in *Buchanan*, who would have expressly overruled *Kelly* on the ground that it is inconsistent with the purposes of the Workers' Compensation Act, have since been replaced on the court.[80] Moreover, attempts by plaintiff's counsel to circumvent *Kelly*, such as arguing that termination after a settlement constitutes a "change in condition" or "mistake in determination of fact,"[81] which would warrant the

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province of the legislature, and not the courts, to create a cause of action for retaliatory discharge." *Id.* at 763-64 & n.3 (citing *Kelly*, 397 So. 2d at 876-77).

[77] 852 So. 2d 25 (Miss. 2003) (en banc). Justice Graves delivered the opinion for the court. *Id.* at 25.

[78] *Id.* at 27.

[79] *Id.* The employee in *Buchanan* merely alleged she was terminated in response to filing a workers' compensation claim, and attempts to modify her at-will status were unsuccessful. *Id.* at 26-27.

[80] Presiding Justice McRae wrote the dissent, joined by Justice Easley, *see id.* at 27-28 (McRae, P.J., dissenting), and argued that "when employees are forced by statute to give up their right to sue for work-related injuries, they should not also be expected to give up any right to private action for retaliatory termination due to their filing of a claim under the Act." *Id.* at 28. Justice McRae, well known for his plaintiff advocacy, was defeated in his reelection bid in 2003 to current Presiding Justice Dickinson, who received significant campaign funding from various pro-business Republican groups, including the U.S. Chamber of Commerce. Jerry Mitchell, *McRae's Fiery Tenure Ends with No Regrets*, CLARION-LEDGER, Jan. 5, 2004, at 1A. Justice Easley subsequently lost his reelection bid in 2008 to current Justice Chandler. Vicksburg Post, Editorial, *Court Elections Anything but Routine*, HATTIESBURG AM., Nov. 17, 2008, at Opinion. With the departure of these two justices, the outlook for any retaliatory discharge action coming from the courts appears cloudy at best. Alternative arguments to persuade the current court will likely have to be utilized, and this author suggests a few. *See infra* Part IV.

[81] MISS. CODE ANN. § 71-3-53 (2011). A settlement under the Workers' Compensation Act may be reopened for further review within one year of the date of the last payment of compensation, or rejection of such, provided there has been some change in conditions or mistake in determination of fact regarding the settlement. *Id.*;

reopening of a previous settlement, have since been rejected as well.[82]

IV. POSSIBLE SOLUTIONS TO CURRENT MISSISSIPPI LAW UPHOLDING RETALIATORY DISCHARGE

The Mississippi Supreme Court's emphasis in *Kelly* that any remedy within the Workers' Compensation Act for retaliatory discharge must come from the legislature did not go unnoticed.[83] Almost immediately after the opinion, an effort was made to introduce legislation that would have overruled its decision.[84] Despite the court's guidance on what would likely have been acceptable legislation, the effort was unsuccessful[85] and left employers free to terminate for the sole reason that an injured employee has claimed workers' compensation benefits.[86] Recent attempts to amend the Act to expressly recognize a cause of action have been met with similar fate, succumbing to both strong lobbying and partisan politics.[87] Thus, it remains questionable

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see also John R. Bradley, *Time Limitations Which Bar Claims in Mississippi Workers' Compensation: A Re-Examination*, 62 MISS. L.J. 511, 571-606 (1993) (discussing one year statute of limitations for reopening of workers' compensation claims).

[82] *See* Sims v. Ashley Furniture Indus., 964 So. 2d 625, 628 (Miss. Ct. App. 2007). The employee in *Sims* argued that the settlement was entered in bad faith on the part of his employer and he would not have agreed to the settlement had he known his job was in jeopardy. *Id.* at 626-27. The court of appeals disagreed, indicating that termination could not be viewed as a mistake to warrant reopening since the worker could show no reasonable expectation of continued employment after the settlement. *Id.* at 627-28.

[83] *See supra* notes 70-73 and accompanying text.

[84] Shortly after *Kelly* was handed down in February of 1981, the legislature, already in session, made an effort to suspend rules time-barring the introduction of a bill that would have made it unlawful for an employer to terminate an employee for making a good faith claim under the Mississippi Workers' Compensation Act. *See* H.R. 89, 1981 Leg., Reg. Sess. (Miss. 1981); S. Res. 549, 1981 Leg., Reg. Sess. (Miss. 1981); Baker, *supra* note 9, at 598 n.134.

[85] Baker, *supra* note 9, at 598 n.134.

[86] *See supra* notes 63-70 and accompanying text.

[87] *See* H.R. 1076, 2011 Leg., Reg. Sess. (Miss. 2011) (died in committee); H.R. 225, 2011 Leg., Reg. Sess. (Miss. 2011) (died on calendar). One of the bills introduced provided in pertinent part:

> No employer may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, employed counsel to represent him in a claim, instituted, or caused to be instituted, in

whether the legislature has the capacity to ensure that laws protecting the enforcement of its own creation (the Workers' Compensation Act) are enacted.[88] Absent legislative action, responsibility for an exception to the at-will doctrine for the exercise of workers' compensation rights will ultimately rest with the judiciary.[89] Any court-provided remedy will likely derive its reasoning from a combination of statutory interpretation, analogy to other statutes, and recognition of judicially enforceable public policy.[90]

Mississippi courts adhere to the principle that the legislature, and not the judiciary, should make any changes to a statute's meaning.[91] If the statute is unambiguous, the court will refrain from engaging in any sort of statutory construction at all.[92]

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good faith, any proceeding under the Workers' Compensation Law or has testified or is about to testify in any such proceeding.

Miss. H.R. 1076, § 1; *see also* Miss. H.R. 225, § 1 (substantively similar). Legislation has been sponsored in part due to plaintiffs' attorneys who urge that a potential wrongful discharge action would be available to a number of clients. Telephone Interview with John Mayo, Representative, Miss. House Dist. 25 (Feb. 5, 2011) (sponsor of H.R. 225). However, lobbying by business interest groups, such as the Mississippi Manufacturer's Association, present strong opposition to any legislation introduced. Telephone Interview with Percy Watson, Representative, Miss. House Dist. 103 (Feb. 4, 2011) (sponsor of H.R. 1076). Moreover, similar bills that have made it through the House have been defeated in the predominately Republican Senate. *Id.*

[88] The Mississippi Workers' Compensation Act vests a statutory right with employees to receive compensation for at-work injuries, and creates a duty with employers to provide such compensation. *See* MISS. CODE ANN. §§ 71-3-5, -7 (2011). Not providing a private remedy for retaliatory discharge allows employers to circumvent this statutory duty by threatening to terminate an employee who has a potential claim under the Act, thus forcing the employee to choose between compensation or retaining his employment. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (upholding retaliatory discharge would allow employers to subordinate statutory rights of employees); Baker, *supra* note 9, at 597 & n.130.

[89] *See* 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 55:3, at 452-54 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2008). The judiciary may take into account public policy considerations when engaging in statutory interpretation, and should adopt a construction that promotes what the legislature sought to enforce when enacting the statute. *Id.* § 56:1, at 483-89.

[90] *See* LARSON, *supra* note 2, § 104.07, at 104-80 to -83.

[91] *See* Carlisle v. Allen, 40 So. 3d 1252, 1257 (Miss. 2010) (en banc).

[92] *See* Dialysis Solution, LLC v. Miss. State Dep't of Health, 31 So. 3d 1204, 1212 (Miss. 2010) ("When the language used by the Legislature is plain and unambiguous and the statute conveys a clears and definite meaning . . . the Court will have no occasion to resort to the rules of statutory interpretation." (quoting Bellsouth

While courts have the power to modify judicially created common law, only the legislature may alter the language of its enactments, such as the Workers' Compensation Act.[93] However, if the statute is susceptible to more than one reasonable interpretation, the statute should be given a construction which will best effectuate its purpose, rather than one which would defeat it.[94]

With these principles in mind, a plausible argument could be made that interpreting the Workers' Compensation Act to allow a wrongful discharge cause of action would not be judicial intervention in legislative affairs,[95] but simply construing its language to effectuate the legislative intent.[96] The courts have found that the legislature intended the Act be given a liberal construction and that "[d]oubtful cases must be compensated."[97] The Act is to be viewed as a whole without isolating any particular provision apart from the rest.[98] A statutory contract is created, vesting employees with a right to receive compensation and

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Telecomms., Inc. v. Miss. Pub. Serv. Comm'n, 18 So. 3d 199, 203 (Miss. 2009))). Courts will apply the plain meaning of a statute unless to do so would be inconsistent with the obvious intent of the legislature. *Id.*

[93] *See, e.g.*, McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993) (altering common law employment at-will doctrine); Washington v. Woodland Vill. Nursing Home, 25 So. 3d 341, 358 (Miss. Ct. App. 2009) (en banc) (finding Workers' Compensation Act is legislative creation, which the legislature alone has power to modify).

[94] Delta Reg'l Med. Ctr. v. Green, 43 So. 3d 1099, 1103 (Miss. 2010).

[95] As noted previously, the court in *Kelly* was concerned with exercising judicial restraint and preserving the separation of powers. *See* Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981); *supra* notes 71-72 and accompanying text.

[96] *See infra* notes 106-24 and accompanying text.

[97] *E.g.*, Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 889 (Miss. 1980) ("[The Act] should be construed fairly to further its humanitarian aims. Doubtful cases must be compensated." (citations omitted)); Total Transp., Inc. of Miss. v. Shores, 968 So. 2d 400, 410 (Miss. 2007) (Diaz, P.J., dissenting) (same); *see also* Baker, *supra* note 9, at 586-87 n.69, 593-94 n.103 (discussing judicial interpretation of legislative intent behind Act).

[98] *See* Crowe v. Brasfield & Gorrie Gen. Contr., Inc., 688 So. 2d 752, 755 (Miss. 1996) (en banc) ("[T]he intent of the legislature must be determined by the total language of the statute and not from a segment considered apart from the remainder." (quoting Doubleday v. Boyd Constr. Co., 418 So. 2d 823, 826 (Miss. 1982) (en banc)) (internal quotation marks omitted)).

placing a duty on employers to provide it.[99] In consideration, the employee forgoes any action in tort against the employer while ensuring a minimal recovery for his injuries.[100] The Mississippi Supreme Court has recognized the strong public interest behind the Act, stating: "The entire system was designed to insure that those injured as a result of their employment would not be reduced to a penniless state and thereby become dependent on some form of governmental public assistance." [101]

It is true that proposed amendments to the Act expressly providing a cause of action have to date been unsuccessful.[102] There are, however, many alternative reasons, aside from disagreement over the content, as to why legislation has failed to come to fruition, such as log-rolling, time constraints, and strong

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[99] *See* MISS. CODE ANN. § 71-3-3 (2011) (definitions section); MISS. CODE ANN. § 71-3-7 (2011) (liability for payment of compensation); MISS. CODE ANN. § 71-3-9 (2011) (exclusive liability provision).

[100] *See* § 71-3-9 ("The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . ."). The statute expressly eliminates any common law defenses of the employer, such as master servant, assumption of risk, and contributory negligence. *Id.* Statutory caps on recovery preclude employers from incurring excessive liability. *See* MISS. CODE ANN. § 71-3-13 (2010). The Mississippi Supreme Court has summed up the give-and-take rationale behind the Act, stating:

> This type of legislation is generally viewed as a compromise between the interest of labor and business. Because of the exclusive nature of the remedy labor surrenders the right to assert a common law tort action along with the attendant possibility of achieving punitive damages. In exchange it receives assurance that an award is forthcoming. Industry surrenders its three major common law defenses: contributory negligence, assumption of risk, and the fellow servant rule. In exchange it receives the knowledge that there will be no outrageously large judgments awarded to injured employees.

Franklin Corp. v. Tedford, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting Miller v. McRae's, Inc., 444 So. 2d 368, 370 (Miss. 1984) (footnote omitted)) (internal quotation marks omitted).

[101] *Franklin Corp.*, 18 So. 3d at 220 (quoting *Miller*, 444 So. 2d at 370) (internal quotation marks omitted). Failing to allow a remedy for retaliatory discharge seems contrary to this rationale, as doing so potentially shifts the financial responsibility for workplace injuries from the employer to the public. *See infra* notes 144-48 and accompanying text.

[102] *See supra* notes 84-87 and accompanying text.

lobbying efforts.[103] To allow complete circumvention of such an important piece of legislation clearly defies any rational intent behind the Act.[104] Alternatively, several methods of statutory interpretation could be used to ensure employer compliance with the Act and thus promote what the legislature initially sought to achieve—a compromise between labor and business interests in the state of Mississippi.[105]

First, despite the majority's position in *Kelly*, the court has otherwise found the exclusive liability provision of the Act susceptible to more than one reasonable interpretation.[106] For instance, an employee may maintain an action against his employer for certain intentional torts,[107] so long as the employer

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[103] *E.g.*, Murphy v. City of Topeka-Shawnee Cnty. Dep't of Labor Servs., 630 P.2d 186, 192-93 (Kan. Ct. App. 1981). Recognizing retaliatory discharge for workers' compensation despite legislative inaction, the Kansas Court of Appeals noted: "For the legislature to fail to act on a matter is clearly not the same as for it to take positive action to exclude jurisdiction." *Id.* at 193. Professor Larson, agreeing with the decision, also observed that "there are many reasons besides rejection on the merits that may account for the nonpassage of a piece of legislation." LARSON, *supra* note 2, § 104.07, at 104-66; *see also supra* notes 84, 87 and accompanying text.

[104] *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973) (noting public policy of Indiana's workmen's compensation laws would be jeopardized if employee subjected to reprisal for exercising statutory rights); Baker, *supra* note 9, at 598 (failure to provide for retaliatory discharge "opens the door to coercion, duress, and other unconscionable acts. Additionally, it completely subordinates the legal right of the employee to obtain compensation . . . ." (footnotes omitted)).

[105] For a discussion on legislative intent behind the enactment of the Mississippi Workers' Compensation Act, see *supra* note 100 and accompanying text, and see generally Satterfield, *supra* note 3.

[106] *See supra* note 100 and accompanying text (discussing exclusive liability provision). Based on the Act's requirement that injuries must be "accidental" to be compensable, *see* MISS. CODE ANN. § 71-3-3 (2011), courts have found that certain intentional torts fall outside the scope of the exclusivity provision, thus allowing a common law tort action against the employer. *See Franklin Corp.*, 18 So. 3d at 221.

[107] *Franklin Corp.*, 18 So. 3d at 221. An employee may maintain an action in tort against his employer for an injury caused by the employer's willful and malicious acts, or for the same acts of a co-employee within the scope of employment and in furtherance of his employer's business. *See* Windfield v. Groen Div., Dover Corp., 740 F. Supp. 1230, 1236 (S.D. Miss. 1990) (fraud); Lee v. Golden Triangle Planning & Dev. Dist., Inc., 797 So. 2d 845, 851-52 (Miss. 2001) (intentional infliction of emotional distress); Speed v. Scott, 787 So. 2d 626, 631 (Miss. 2001) (en banc) (defamation); Levens v. Campbell, 733 So. 2d 753, 761 (Miss. 1999) (conspiracy); Royal Oil Co. v. Wells, 500 So. 2d 439, 442 (Miss. 1986) (malicious prosecution); Miller v. McRae's, Inc., 444 So. 2d 368, 371 (Miss. 1984) (false imprisonment).

acted with the "actual intent to injure the employee."[108] The court's reasoning is that public policy recognizes some conduct as "so shockingly outrageous" that tort immunity should not be afforded.[109] Yet, when passing on the merits of retaliatory discharge—an intentional tort itself when recognized—the *Kelly* court retreated, clinging to the notion that since no explicit remedy is provided for in the Act, none could be implied.[110] The reasoning of the court is inconsistent, given that the Act likewise does not expressly provide a remedy for any intentional torts.[111] Moreover, damages in the context of retaliatory discharge are similar to most other intentional torts not involving a physical injury: lost wages, mental anguish, harm to reputation, and potential punitive damages.[112] Therefore, since the exclusive liability provision is subject to more than one interpretation and should be given a construction which would effectuate its purpose, not defeat it, a court could conceivably construe the provision as permitting the intentional tort of retaliatory discharge.[113]

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[108] *Franklin Corp.*, 18 So. 3d at 232 (quoting Peaster v. David New Drilling Co., 642 So. 2d 344, 349 (Miss. 1994)) (internal quotation marks omitted). The employer's willful and malicious act must have been "designed to bring about the injury." *Id.* at 232 (quoting *Peaster*, 642 So. 2d at 349-50). Following the majority of jurisdictions, the court has rejected the "substantially certain" test used at common law, as well any reckless conduct or gross negligence, emphasizing that absent an actual intent to injure the employee, the Workers' Compensation Act will be the exclusive remedy. *Id.* (quoting *Peaster*, 642 So. 2d at 348).

[109] *Id.* at 221 ("This limitation on the Act's exclusivity 'reflects the public policy that certain courses of conduct (intentional torts) are so shockingly outrageous and beyond the bounds of civilized conduct that the person responsible should not be rewarded with tort immunity.'" (quoting JOHN R. BRADLEY & LINDA A THOMPSON, MISSISSIPPI WORKERS' COMPENSATION § 11:8 (2007)) (internal quotation marks omitted)).

[110] *See* Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 876-77 (Miss. 1981); *supra* notes 69-71 and accompanying text.

[111] *See supra* note 106 and accompanying text.

[112] Given that "actual intent to injure" may be inferred from the circumstances, *see Franklin Corp.*, 18 So. 3d at 239, it is here suggested that an employer who terminates an employee solely for filing a good faith claim under the Act may indeed possesses this requisite intent. The employee suffers injury to their liberty to exercise a statutory right, harm to reputation as one who has been terminated from employment, economic loss from lost wages, and mental anguish and humiliation from termination; and the employee would potentially be entitled to any punitive damages that would suffice to deter the employer from future conduct.

[113] *See supra* notes 94, 96-101 and accompanying text. However, given the court's extremely narrow interpretation of "actual intent to injure," *see supra* note 109, this

Second, strong authority also exists for the power of the judiciary to imply a right of action into a statute.[114] This is especially pertinent in the context where a statute imposes a right and a corresponding duty, but is silent as to any means of enforcing this right.[115] If the public interest will be affected, the courts should reject any narrow construction which would jeopardize what the legislature sought to promote.[116] Any implied remedy is typically exclusively available only to those classes of persons whom the law was designed to benefit.[117]

In the jurisdictions which have judicially created a cause of action for wrongful discharge in the absence of express legislation, the observation has been that not implying a remedy would allow the employer to evade a primary purpose of the workers' compensation laws—providing compensation to injured employees.[118] In fact, the cause of action itself appears to have

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argument would likely have to be raised in the most egregious of circumstances to have any appeal.

[114] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 38 (Proposed Final Draft No. 1, 2005) (noting courts may imply private right of action when none is expressed to effectuate legislative purpose behind statute); SUTHERLAND, *supra* note 89, § 55:3, at 452-54 (same).

[115] SUTHERLAND, *supra* note 89, § 55:3, at 453-54 ("If a statute which creates a right does not indicate expressly the remedy, one is usually implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law." (footnote omitted)). However, no remedy should be implied if the statute's language is unambiguous. *Id.* § 55.3, at 455-56.

[116] *Id.* § 56:1, at 486-89. Courts should especially reject any narrow interpretation of a statute if such interpretation would discourage rather than encourage what the legislation specifically is designed to enforce. *Id.*

[117] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 38 (Proposed Final Draft No. 1, 2005); *see also* Baker, *supra* note 9, at 587 n.70. Of course, at-will employees would fall under the class of persons whom the Mississippi Workers' Compensation Act was designed to benefit. *See* MISS. CODE ANN. § 71-3-1 (2011) (stating the purpose of the Act); Satterfield, *supra* note 3, at 27-36 (discussing Act's intended beneficiaries).

[118] *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978). The court in *Kelsay* was concerned that not recognizing an action for retaliatory discharge would leave the employee without any common law or statutory remedy. *Id.* Such a result "effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to the public policy as expressed in the Workmen's Compensation Act." *Id.*; *see also* LARSON, *supra* note 2, § 104.07, at 104-57 n.1 (listing jurisdictions that recognize cause of action by judicial decision).

evolved in part from this line of reasoning.[119] The first court to recognize retaliatory discharge in the context of workers' compensation cases did so by implication, stating that "[i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined."[120] This view has become prevalent, with a leading treatise noting that if the applicable act contains strong public policy which would be diluted by allowing employers to use the threat of discharge, then typically a cause of action should be allowed.[121] Given this authority, why Mississippi remains steadfast in its position that any remedy must come from the legislature remains a mystery.[122] Regardless of legislative silence on the issue, the courts possess the power to rectify the inability of the Act to enforce itself.[123] Failure to do so essentially makes the Mississippi Workers' Compensation Act a lame duck in the eyes of

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[119] *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427-28 (Ind. 1973). Around this same time, Texas became the first state to adopt a comprehensive statutory scheme addressing the issue. *See supra* note 73.

[120] *Frampton*, 297 N.E.2d at 427. In a landmark case, the Indiana Supreme Court, with no direct authority no rely on, considered it strong public policy that compensation should be available to injured workers. *Id.* at 427-28. The court said that "[u]pholding retaliatory discharge [would] open[] the door to coercion and other duress-provoking acts." *Id.* at 248. Determining that the threat of discharge is a "device" contemplated by the statute, the court implied a right of action for retaliatory discharge. *Id.* (citation omitted); *see supra* notes 2, 69.

[121] LARSON, *supra* note 2, § 104.07, at 104-81 ("[A]n exception will be carved out of employment at will when there is strong public policy actually embodied in a specific statute, which policy would be undermined and thwarted if an employer could use the threat of discharge to bully its employees out of exercising their rights under that policy.").

[122] *See supra* notes 71-72, 74 and accompanying text. A possible explanation for the judicial deference is the statutory interpretation cannon that no legislative action taken on an issue demonstrates acquiescence or indifference towards that particular issue. Moreover, if this legislative silence occurs after a judicial decision interpreting the legislation, it is often argued that this is indication of legislative approval of the judicial interpretation. *See* OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 644 (4th ed. 2008). Indeed, at least one federal court passing on retaliatory discharge under Mississippi law has based its reasoning in part on these principles. *See* Pipkin v. Piper lmpact, Inc., 70 F. App'x 760, 763 (5th Cir. 2003) (per curiam) (finding that until state courts or legislature acts, *Kelly* remains law in Mississippi).

[123] *See supra* notes 114-17 and accompanying text.

certain employers who face no consequence for not complying with what was intended to be a statutory compromise.[124]

Notwithstanding any statutory construction approach, Mississippi courts—with the authority to modify the common law[125]—could alternatively adopt a public policy exception to the at-will doctrine for the exercise of workers' compensation rights by simply expanding the current exceptions recognized in *McArn*.[126] Contrary to the position taken in *Kelly*,[127] later dicta from the Mississippi Supreme Court indicates that the workers' compensation laws may indeed provide the requisite public policy from which to carve an exception.[128] For instance, in *Perry v. Sears, Roebuck & Co.*, the court observed that public policy exceptions in other jurisdictions are typically "based on the employee's (1) refusal to commit an unlawful act, (2) performance of an important public obligation or (3) *exercise of a statutory right or privilege*."[129] The court cited a leading case for the proposition that "sources of public policy include legislation[;] administrative

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[124] *See* Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25, 28 (Miss. 2003) (McRae, P.J., dissenting). Justice McRae noted that upholding retaliatory discharge allows employers to circumvent their statutory obligation to compensate employees created under Mississippi Workers' Compensation Act. *Id.*; *see supra* note 80.

[125] *See* Laws v. Aetna Fin. Co., 667 F. Supp. 342, 345 (N.D. Miss. 1987) (finding terminable at-will doctrine judicially created and can thus be modified by judiciary); McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993); *see also supra* notes 41-43. The common law may also be modified or repealed by statute. *See, e.g.*, Hemingway v. Scales, 42 Miss. 1 (1868).

[126] *See supra* notes 40-56 and accompanying text.

[127] Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981) (stating that any amendments to the Workers' Compensation Act or public policy determinations of law should be "vested exclusively in the Legislature").

[128] *See* Franklin Corp. v. Tedford, 18 So. 3d 215, 221 (Miss. 2009) (en banc) (indicating Act's exclusive liability provision has certain exceptions for intentional torts founded on public policy); *see also supra* note 106 and accompanying text.

[129] 508 So. 2d 1086, 1089 (Miss. 1987) (citing Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983)) (emphasis added); *see also* McCranie, *supra* note 21, at 520-21 (exceptions to at-will employment recognized for refusal to violate criminal statute, performing public obligation, exercising statutory right, and general public policy). An exception based on exercising a statutory right has arisen most frequently in the context of workers' compensation. McCranie, *supra* note 21, at 520-21 n.20.

rules, regulations or decisions[;] and judicial decisions."[130] Furthermore, since *Kelly* was decided, later court decisions have recognized the "harsh effects" of the at-will doctrine,[131] with *McArn* demonstrating that there are at least some instances in which a departure is warranted.[132] Thus, any exception for retaliatory discharge will likely be contingent upon a finding of some public policy that the court feels compelled to promote.[133]

Conceding that retaliatory discharge is by no means a "criminal act" as contemplated by *McArn*'s narrow exceptions,[134] restricting any recognized public policy to this scope ignores sound reasoning by the majority of jurisdictions and leading scholars.[135] Professor Lex Larson points out that if a jurisdiction is to permit any exception to employment-at-will, "the compensation claim cases would be the clearest possible application, since the public policy involved is not only expressly enunciated in a statute but also touches the health, safety, and welfare of all who work for a

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[130] *Perry*, 508 So. 2d at 1089-90 (quoting Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980)). Given that the Workers' Compensation Act is a legislative creation enforced by a state administrative agency, it would seem plausible to conclude that it could be a viable source for public policy under this line of reasoning.

[131] *See* Bobbitt v. Orchard, Ltd., 603 So. 2d 356, 361 (Miss. 1992) (expressing "growing unease" with the "harshness" of at-will employment rule); Shaw v. Burchfield, 481 So. 2d 247, 254 (Miss. 1985) (sympathizing that employers have superior bargaining position in at-will employment settings); *see also supra* notes 29-39 and accompanying text.

[132] *See supra* Part II. However, these developments to the at-will doctrine did not appear to be a factor the most recent time the court was presented with an opportunity to overrule *Kelly*. *See* Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25, 26-27 (Miss. 2003) (en banc); *supra* notes 77-80.

[133] *See* LARSON, *supra* note 2, § 104.07, at 104-80. Professor Larson notes that the jurisdictions which have yet to confront the issue of retaliatory discharge through the judiciary will ultimately have to resort to public policy analogies, as opposed to creating a cause of action based solely on the plain language of the applicable statute. *Id.*

[134] *See Buchanan*, 852 So. 2d at 27 (finding that since employee did not allege any criminal violations, termination solely for filing workers' compensation claim not actionable under *McArn*). While Mississippi's Act makes no mention of retaliatory discharge, a small minority of other state statutory schemes expressly make it a crime to terminate any employee for exercising rights under the applicable laws. *See, e.g.*, ARK. CODE ANN. § 11-9-107 (2002) (potential felony); *see also* LARSON, *supra* note 2, § 104.07, at 104-65 n.40.

[135] *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973); LARSON, *supra* note 2, § 104.07, at 104-57 to -68.

living."[136] Given that the *Kelly* court managed to find no such public policy embedded in the Mississippi Workers' Compensation Act,[137] a plausible argument could still be made that the policy behind the Act has evolved since *Kelly* was decided in 1981.[138] Moreover, expanding *McArn*'s holding to encompass retaliatory discharge in workers' compensation would not only be a proper exercise of judicial power, but would demonstrate that Mississippi jurisprudence is capable of adapting to changing needs and values within the contemporary employment setting.[139]

First, there is authority for the proposition that a statute's interpretation should not be confined to what the legislature initially contemplated when enacting it, but should reflect the statute's purpose in the context of the changing needs of society.[140] It is unlikely that the Mississippi legislature considered the need to include retaliatory discharge when drafting the Workers' Compensation Act, as the first comprehensive amendment to any state's statutory scheme allowing retaliatory discharge came well after the initial enactment of its workers' compensation laws.[141]

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[136] LARSON, *supra* note 2, § 104.07, at 104-83.

[137] *See supra* note 70 and accompanying text.

[138] *See infra* notes 140-48 and accompanying text.

[139] *See supra* notes 106, 114-17, 121, 125 and accompanying text (discussing court's authority to recognize retaliatory discharge). The common law at-will doctrine has been severely criticized for its failure to conform to modern reality, with one court colorfully describing:

> Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and the duty of amending it to reflect social and economic changes.

Laws v. Aetna Fin. Co., 667 F. Supp. 342, 347 (N.D. Miss. 1987) (quoting Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring)).

[140] *See* 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45.9, at 60-61 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (stating that words of a statute should be interpreted as "relating the statutory concept, spirit, purpose, or policy to changing needs of society" (footnote omitted)). Sutherland acknowledges that while the term "public policy" is an indefinite concept, it should "manifest[] the values, norms and ideals of a society." SUTHERLAND, *supra* note 89, § 56:1, at 489-90.

[141] *See* LARSON, *supra* note 2, § 104.07, at 104-59. Texas, having originally enacted a workers' compensation law in 1913, *see* Act of Apr. 13, 1913, ch. 179, 1913 Tex. Gen.

Second, since *Kelly*'s refusal to recognize retaliatory discharge, the number of contested workers' compensation claims has risen over fourteen percentage points, from 9.57% in 1981 to 23.63% in 2009.[142] This suggests that employers are perhaps becoming more apprehensive towards employees exercising their statutory rights, and gives all the more reason to suspect that threats of discharge are more commonplace than one might initially suppose.[143]

Finally, upholding retaliatory discharge potentially shifts the financial burden of workplace injuries from the employer to the

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Laws 429, appears to be the first state to address the issue of retaliatory discharge with a complete statutory amendment, although the original amendment has since been repealed and recodified. *See* Act of May 7, 1971, ch. 115, 1971 Tex. Gen. Laws 884 (codified as amended at TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (repealed 1993), *recodified at* TEX. LAB. CODE ANN. § 451.001 (West 2006)). For a history of the 1948 enactment of the Mississippi Workers' Compensation Act, see generally Satterfield, *supra* note 3. As little to no legislative history exists regarding whether retaliatory discharge was contemplated by the Mississippi legislature, the courts' interpretation that no cause of action exists because none is expressed may be counterintuitive, because such a ruling itself could equally amount to an interpretation that the statute is inapplicable. *See* SUTHERLAND, *supra* note 140, § 45:9, at 59-60. Based on this latter interpretation, since the statute would be inapplicable, the courts could recognize retaliatory discharge by simply expanding the common law exceptions based on public policy.

[142] *See Annual Report Cumulative Information Tables*, MISS. WORKERS' COMP. COMM'N, http://www.mwcc.state.ms.us/info/_annreportcumu.asp (last visited Mar. 6, 2012) ("Total Claims by Year"). Moreover, the number of "lost time" cases filed per year since *Kelly* has actually gone down, from 14,456 in 1981 to 11,090 in 2009. *Id.* This statistic rebuts any assertion that employers are becoming more apprehensive due to an increasing number of suspect claims. Quite the contrary, it potentially shows that employees who may be threatened with discharge are simply forgoing benefits and electing to retain employment instead.

[143] Although no specific data exists on the effect upholding retaliatory discharge has within the employment at-will setting, none should be needed for the courts to rely on this principle. If Mississippi follows the lead of most jurisdictions, employers would be imposed with very minimal standards for termination. First, the employee usually must have filed a claim in "good faith," or the cause of action does not exist. *See* LARSON, *supra* note 2, § 104.07, at 104-57 to -64. Thus, any fraudulent attempts to exploit compensation would not be protected. Second, most jurisdictions require the employee be terminated "solely" for exercising workers' compensation rights, a very high standard which will not be met if the employer has some other good faith reason to terminate. *Id.* § 104.07, at 104-66 to -78.

public.[144] Most workers' compensation benefits are funded by the employer, who must either qualify as a self-insurer or purchase private insurance.[145] An injured worker who is threatened with termination faces two options. He may elect to remain employed and forgo a claim under the Workers' Compensation Act in turn potentially relying on government assistance programs, such as Medicaid, to redress his injuries; or the worker may choose termination. In the latter scenario, although receiving due compensation, the employee oftentimes must resort to Social Security Disability or unemployment benefits for support during the interim period after recovery but before reemployment.[146] This predicament, however, is contradictory to the Act's fundamental design to ensure injured workers do not become "dependent on some form of governmental public assistance,"[147] and appears to provide the courts with a plausible source of public policy.[148]

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[144] Compensation for lost wages and medical benefits paid in 2009 totaled over $300 million. *See* MISS. WORKERS' COMP. COMM'N, *supra* note 142 ("Total Compensation and Medical").

[145] Private insurers footed 57.88% of the bill in 2009, totaling over $184 million. *Id.* Self-insured employers covered the rest, paying over $134 million in compensation and medicals in 2009. *Id.*

[146] To be eligible for unemployment benefits the person must be unemployed "through no fault of their own." MISS. CODE ANN. § 71-5-3 (2011). A whole new debate, better left for another day, arises when one considers whether an employee discharged solely for exercising workers' compensation rights satisfies this standard.

[147] *See* Franklin Corp. v. Tedford, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting Miller v. McRae's, Inc., 444 So. 2d 368, 370 (Miss. 1984)); *supra* note 101. One commentator has suggested that a state court with a presumption of terminable-at-will employment can and should alter such a presumption to favor economic stability. *See* John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 481 (1980).

[148] The public policy behind unemployment benefits is expressed in section 71-5-3, which emphasizes the legislature's concern with the economic effect involuntary unemployment has on workers as well as the promotion of a stable employment setting:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people in this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and lighten it burden, which now so often falls with crushing force upon the unemployed worker and his family. . . . This can be provided by encouraging employers to

Aside from any statutory construction or public policy approach, courts could also recognize retaliatory discharge by analogy and reference to federal laws that similarly serve to compensate workplace injuries.[149] For instance, the Longshore and Harbor Workers' Compensation Act (LHWCA),[150] which applies to land-based maritime workers, makes it unlawful for an employer to discharge or discriminate against an employee for claiming compensation under the Act.[151] Since Congress apparently felt the ramifications of retaliatory discharge warrant an express provision prohibiting it, Mississippi courts could potentially use the LHWCA as a statutory reference to derive public policy.[152] However, as courts have premised their refusal to recognize a cause of action on the lack of a similar provision in the Mississippi Workers' Compensation Act, perhaps this assertion is better directed towards the legislature.[153]

A stronger argument could be made for an analogy to the Jones Act.[154] The Jones Act, as distinguished from the LHWCA, applies to "seamen" who are members of a ship or vessel crew.[155]

> provide more stable employment and by [setting aside funds from employment income to provide benefits] . . . .

§ 71-5-3.

[149] *See* LARSON, *supra* note 2, § 104.07, at 104-80 ("Since this area of compensation law is so recent, any of the many jurisdictions that must still confront the problem judicially will inevitably have to resort to analogies as well as to directly comparable compensation cases.").

[150] 33 U.S.C. §§ 901-950 (2006).

[151] 33 U.S.C. § 948a (2006 & Supp. 2009). Any employer found in violation of this section is subject to civil penalties of up to $5000, and the employee is to be reinstated to his position with compensation for any loss of wages during the interim period. *Id.* Thus, since the Act expressly provides the remedy, any state-law-based retaliatory discharge claim might be pre-empted. *See* Ravencraft v. Sundowner Offshore Servs., Inc., No. 97-3572, 1998 U.S. Dist. LEXIS 7478, at *4 (E.D. La. May 13, 1998).

[152] *See supra* note 130 (establishing sources of public policy may include legislation).

[153] *See supra* notes 70-73 and accompanying text.

[154] 46 U.S.C. § 30101 (2006 & Supp. 2009). The Jones Act makes the provisions of Federal Employer's Liability Act applicable to seaman injured in the course of their employment. *See* Ann K. Wooster, *Validity, Construction, and Application of the Jones Act, 46 U.S.C.A. § 688—Supreme Court Cases*, 170 A.L.R. FED. 587, 589 (2001); *see also* Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2006).

[155] *See* 46 U.S.C. § 30104 (2006). The Jones Act and the LHWCA are exclusive. Which federal act applies depends not on the place of injury, but rather on the nature of the employee's service. If the worker owes his allegiance to a vessel and not a land-based employer, the Jones Act will apply, and vice versa. *See* Wooster, *supra* note 154,

Importantly, like the Mississippi Workers' Compensation Act, the Jones Act does not contain an explicit provision prohibiting retaliatory discharge.[156] Many jurisdictions have instead taken the liberty to imply a right of action, following the lead of the seminal Fifth Circuit decision, *Smith v. Atlas Off-Shore Boat Service, Inc.*[157] Having no statutory or case law to rely on, the Fifth Circuit in *Smith* resorted to common law maritime cases involving at-will employment for guidance.[158] Rejecting the rationale behind the common law at-will doctrine as no longer applicable to modern employment, the court adopted a public policy based approach to recognize a cause of action for retaliatory discharge.[159] The court stated that failing to do so would in effect abrogate employees' rights under the Jones Act, leaving the employee with no legal redress whatsoever for his injuries.[160] The court was also mindful of the potential effect upholding retaliatory discharge has on the government's economic interest, stating: "To permit the seaman's discharge because he resorts to the courts may result in casting the burden of the employer's reprisal in part

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at 611-13. If neither the Jones Act nor the LHWCA is applicable, the injured worker may still recover under state workers' compensation laws. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 355-56 (1995).

[156] The Jones Act however, differs from the Mississippi Workers' Compensation Act in one important aspect: A seaman under the Jones Act may bring a civil action in tort against his employer for personal injury or death caused by the employer's negligence. *See* 46 U.S.C. § 30103 (2006).

[157] 653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

[158] *Id.* at 1060. Absent an express contractual provision, the majority of maritime employment is deemed to be "terminable at will by either party." *Id.* (quoting Findley v. Red Top Super Mkts., Inc., 188 F.2d 834, 837 n.1 (5th Cir. 1954)). The court also cited *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981), for the position that an at-will employee may be terminated for filing a workers' compensation claim. *Smith*, 653 F.2d at 1061 n.4.

[159] *Smith*, 653 F.2d at 1061-65. The court stated that the principle of mutuality of obligations between employer and employee as a premise for at-will employment is misguided, given that in modern settings the employer often has a superior bargaining position. *Id.* at 1061; *see also supra* note 29 and accompanying text. Relying on public policy rationale, the court created a cause of action for retaliatory discharge in the event an employee is terminated for exercising his right to bring a personal injury claim against his employer. *Smith*, 653 F.2d at 1065.

[160] *Smith*, 653 F.2d at 1062. While acknowledging that discharge of at-will seaman is in essence lawful under the Jones Act, "[t]he employer should not be permitted to use his absolute discharge right to retaliate against a seaman for seeking to recover what is due him or to intimidate the seaman from seeking legal redress." *Id.*

on the public in the form of unemployment compensation or social security for the worker or his family."[161]

This reasoning of the Fifth Circuit, subsequently adopted by other jurisdictions interpreting the Jones Act,[162] could conceivably provide guidance for Mississippi state courts interpreting the Mississippi Workers' Compensation Act.[163] Both statutes compensate workplace injuries and lack express provisions for retaliatory discharge.[164] Denying a cause of action under either statute also potentially places the financial responsibility for injuries on the shoulders of federal and state government programs.[165] Thus, a state court could likewise resort to the common law to create a much needed public policy exception for retaliatory discharge in workers' compensation.[166]

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[161] *Id.* at 1062-63. This rationale can be analogously applied to the argument that upholding retaliatory discharge under the Mississippi Workers' Compensation Act would be contrary to the Act's design to ensure injured workers are not "reduced to a penniless state and thereby become dependent on some form of governmental public assistance." Franklin Corp. v. Tedford, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting Miller v. McRae's, Inc., 444 So. 2d 368, 370 (Miss. 1984)); *see supra* notes 101, 144-48 and accompanying text.

[162] Following *Smith*, several federal courts have recognized wrongful discharge as an exception to the at-will employment doctrine under general maritime law. *See, e.g.*, Zbylut v. Harvey's Iowa Mgmt. Co., 361 F.3d 1094, 1095-96 (8th Cir. 2004); Borden v. Amoco Coastwise Trading Co., 985 F. Supp. 692, 697 (S.D. Tex. 1997). At least one court has broadened *Smith*'s holding to include termination for any condition that presents perilous dangers for mariners and the general public. *See* Seymore v. Lake Tahoe Cruises, Inc., 888 F. Supp. 1029, 1034-35 (E.D. Cal. 1995). Of the jurisdictions which have narrowly construed *Smith*'s holding, at a minimum a cause of action for retaliatory discharge still exists in the event an employee is terminated for filing a personal injury action against his maritime employer. *See* Meaige v. Hartley Marine Corp., 925 F.2d 700, 702 (4th Cir. 1991).

[163] *See supra* notes 144-49, 161 and accompanying text.

[164] *See supra* notes 149, 156 and accompanying text.

[165] *See supra* note 161 and accompanying text.

[166] Alternatively, provided the jurisdictional requirements are met, a plaintiff could seek redress in the federal courts on a pendent retaliatory discharge claim. However, any success seems more likely to occur in the state court. Although the lone district court to make an "*Erie*-guess" for an exception to the at-will rule for refusal to participate in illegal acts proved to be correct, the court had strong dicta to rely on from its state counterparts. *See* Laws v. Aetna Fin. Co., 667 F. Supp. 342, 346 (N.D. Miss. 1987) (basing decision in part on dicta from *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086 (Miss. 1987)). In contrast, no state court to date has provided any indication of a willingness to depart from the holding in *Kelly*. *See supra* notes 74-82 and accompanying text. Furthermore, the last federal court to pass on retaliatory discharge

CONCLUSION

Mississippi was the last state to enact a workers' compensation law.[167] It should not be the last state to permit a cause of action for employees terminated solely for exercising rights created under these exact same laws.[168] The rationale behind a strict at-will doctrine is severely outdated, and modern employment expectations are no longer consistent with its application.[169] An overwhelming majority of jurisdictions have acknowledged this and applied sound reasoning based on public policy to recognize a cause of action for retaliatory discharge.[170] Mississippi's failure to do so leaves its at-will employees with a risk nearly unique in America, and no remedy against an employer who chooses to circumvent his statutory duties by means of intimidation and coercion.[171]

While the legislature's failure to rectify the situation is particularly inexcusable, the judiciary is also in no small part to blame since the courts likewise possess authority to recognize retaliatory discharge.[172] Several principles of statutory construction are available to imply a cause of action into the Mississippi Workers' Compensation Act.[173] Reference could also be made to similar federal laws, such as the Jones Act and the LHWCA.[174] Perhaps most significantly, however, public policy

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in the context of workers' compensation emphasized that absent any statutory provision or state court decision, it was without authority to permit a cause of action. *See* Pipkin v. Piper Impact, Inc., 70 F. App'x 760, 762-63 (5th Cir. 2003) (per curiam); *supra* notes 74-76 and accompanying text.

[167] The state legislature adopted the Mississippi Workers' Compensation Act in 1948. Workmen's Compensation Law, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -129 (2011)); *see* Satterfield, *supra* note 3, at 27.

[168] *See supra* notes 1-2 and accompanying text.

[169] *See supra* notes 27, 30, 129, 159 and accompanying text.

[170] *See supra* notes 1-2, 118-21 and accompanying text.

[171] *See supra* notes 88, 120-24 and accompanying text.

[172] *See supra* notes 83-89, 102-49 and accompanying text. The legislature's failure is particularly inexcusable due to the framework provided by the Mississippi Supreme Court in *Kelly* for a future amendment expressly permitting a cause of action that presumably has judicial approval. *See* Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 877 n.2 (Miss. 1981).

[173] *See supra* notes 96-124 and accompanying text.

[174] *See supra* notes 149-66 and accompanying text.

considerations strongly suggest that the State of Mississippi would benefit considerably from a long-overdue change in the law.[175] The percent of contested compensation cases has risen dramatically since *Kelly*, suggesting that apprehension towards filing claims has risen.[176] Moreover, the financial responsibility for workplace injuries should under no circumstances fall on government programs, particularly when express statutory provisions place the burden directly on employers who derive their income from these same employees.[177] As societies have evolved in modern times, so too has public policy.[178] Mississippi needs to evolve as well, and in doing so, *Kelly*'s outdated decision must be overruled.[179]

*Bryan C. Sawyers**

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[175] *See supra* notes 125-48 and accompanying text.

[176] *See supra* notes 142-43 and accompanying text.

[177] *See supra* notes 144-48, 161, 165 and accompanying text.

[178] *See supra* note 140 and accompanying text.

[179] Thirty years ago a commentator observed that *Kelly*'s failure to permit a cause of action for retaliatory discharge "opens the door to coercion, duress, and other unconscionable acts." *See* Baker, *supra* note 9, at 598 (footnote omitted). Why this topic is still discussed is disappointing and can fairly be depicted as a valid reason for members of the public to be skeptical of the capacity of the courts and legislature to protect the interests of those with inferior political power, i.e., the at-will employee.

* This author would like to thank Professor John R. Bradley, longtime professor of Workers' Compensation and Contracts at the University of Mississippi School of Law, for his insight and guidance in preparation for this Comment. His many contributions to the legal field will no doubt serve a lasting impact long after he decides to hang his hat on a truly distinguished career.

SUBMITTING TO LEGAL AUTHORITIES: THE DIFFERENCE BETWEEN INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803(3) AND APPLICATION OF MISSISSIPPI RULE OF EVIDENCE 803(3)

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INTRODUCTION

Hearsay statements that illustrate a person's state of mind or internal condition present unique evidentiary challenges. As the venerable case *Mutual Life Insurance Co. of New York v. Hillmon* from the United States Supreme Court noted:

> A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen.[1]

Evidentiary Rule 803 contains an exception for spontaneous statements. Numerous cases and authorities have applied and interpreted this complicated exception. This Comment will examine how leading secondary legal authorities define the scope of the hearsay exception set forth in Federal Rule of Evidence 803(3). Using these authorities as a benchmark, this Comment will then survey Mississippi cases that have applied Mississippi Rule of Evidence 803(3). Ultimately, this Comment aims to determine whether decisions from Mississippi courts applying this exception correspond with the authorities analyzing Federal Rule of Evidence 803.

I. INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803(3)

Four types or categories of spontaneous statements implicate Federal and Mississippi Rule of Evidence 803(3).[2] The first group

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[1] 145 U.S. 285, 295 (1892).

[2] The rule states:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . . . A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

FED. R. EVID. 803(3); *see* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:70 (3d ed. 2007) (describing Rule 803(3) as "a provision of extraordinary importance"); *see also* MCCORMICK ON EVIDENCE 474-80 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter MCCORMICK]; JACK B. WEINSTEIN & MARGARET

of statements, hereinafter category one, involve feelings, symptoms, and conditions.[3] Category two includes statements that indicate the speaker's state of mind.[4] Statements of intent comprise category three.[5] Finally, category four contains statements that recount memories or recite beliefs.[6] Generally, statements in categories one, two, and three fall within the Rule 803(3) exception and are admissible hearsay.[7] The exception does not apply to inadmissible category four statements.[8] A survey of evidence law treatises will define each category's scope.

A. Category One—Statements of Feeling, Symptom, and Condition

To qualify for the Rule 803(3) exception, category one statements must describe a then-existing feeling, symptom, or condition.[9] For example, someone might describe a pain felt while experiencing that feeling, like making an immediate declaration

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A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 16.04 (2011) (noting that Rule 803(3) "combines in one provision what are really two exceptions of markedly different characteristics," referring to "the least troubling and complex exception[]" for feelings, symptoms, and conditions in contrast to the "most difficult issues" raised by statements involving state of mind); GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 803.12 (7th ed. 2011).

[3] MCCORMICK, *supra* note 2, at 474.

[4] *Id.* at 474-76.

[5] *Id.* at 476-78.

[6] *Id.* at 478-80.

[7] *Id.* at 474-78.

[8] *Id.* at 478-80.

[9] *Id.* at 474 ("Being spontaneous, [these] hearsay statements are considered of greater probative value than the present testimony of the declarant."); *see also* 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 29:13, at 687 (7th ed. 2000) ("The statement must describe a physical condition as it exists."); 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1211, at 12-35 (5th ed. 2011) ("If the declarant is asserting a then existing state of mind, there is no concern about the quality of the declarant's memory . . . ."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("While objective conditions may give some indication of the degree of pain involved, the sufferer's own contemporaneous description is often a decidedly superior form of proof."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("*Rule 803(3)* requires that the declaration be directed at a present condition, *i.e.*, a 'then-existing' condition. Only where the subject matter of the statement is a present condition are the testimonial defects in memory and sincerity reduced."); *id.* § 803.13 (stating that rule 803(3) requires "statements concerning . . . present internal physical condition").

after jamming a toe or smashing a finger with a hammer.[10] When an individual makes a statement about a feeling or condition while the sensation still exists, the spontaneity of the statement provides reliability and trustworthiness.[11] However, spontaneity does not require the statement to be made instantaneously with the cause of the declaration.[12] Necessity also justifies excepting these statements from the hearsay prohibition because frequently someone's description of a feeling or condition may be the only evidence available.[13]

Statements in category one resemble similar assertions admitted under the hearsay exception for present sense impressions.[14] To qualify for admission, category one statements cannot describe past feelings, symptoms, or conditions.[15] Category

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[10] MCCORMICK, *supra* note 2, at 474; MUELLER & KIRKPATRICK, *supra* note 2, § 8:70.

[11] FISHMAN, *supra* note 9, at 686 ("[T]he declarant's spontaneous statements describing a physical condition may be more reliable than subsequent in-court testimony where problems of memory and the declarant's self-interest come into play."); MCCORMICK, *supra* note 2, at 474 ("Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement.").

[12] MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("Also, a statement may fit the exception even though it describes present pain caused by a blow or accident many days earlier, for there is no requirement that the statement be contemporaneous with the precipitating event."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("The declaration must be contemporaneous with the physical, emotional, or mental feeling, not the precipitating event."); WEISSENBERGER & DUANE, *supra* note 2, § 803.13 ("While the Rule is predicated upon the characteristic element of the contemporaneousness of the statement and the physical condition, there is no requirement that the statement be made contemporaneously with an external stimulus that produced the condition.").

[13] MCCORMICK, *supra* note 2, at 474; *see also* FISHMAN, *supra* note 9, at 686 ("The need for such evidence is obvious since only the declarant can directly prove internal pain.").

[14] MISS. R. EVID. 803(1); *see* FED. R. EVID. 803 advisory committee's note ("Exception [paragraph] (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility."); *see also* MCCORMICK, *supra* note 2, at 474 ("[T]he rule is a specialized application of the broader rule recognizing a hearsay exception for statements describing a present sense impression, the cornerstone of which is spontaneity."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("[T]he *Rule 803(3)* exception is parallel to the present sense impression exception formulated in *Rule 803(1)*.").

[15] MCCORMICK, *supra* note 2, at 474; *see also* WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("Since contemporaneity is the guarantee of trustworthiness, statements indicative of reflection rather than spontaneity must be excluded. Consequently,

one statements should also not identify or indicate the cause of the declaration.[16] Any individual that hears the speaker make a category one statement can later serve as a witness.[17] The rule's language permits use of category one statements without considering the speaker's availability to testify.[18]

B. Category Two—Statements that Show State of Mind

Hearsay statements can prove the speaker's state of mind.[19] To admit statements indicating state of mind under the exception in Rule 803(3), a cause of action or defense must involve the speaker's state of mind.[20] Simply, one issue in the case must

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descriptions of past pain or symptoms, and explanations of how the injury occurred may not be admitted . . . .").

[16] MCCORMICK, *supra* note 2, at 474; *see also* FISHMAN, *supra* note 9, at 687 ("A statement of current physical condition caused by a past incident falls within the exception, but a statement about the cause of that present condition does not."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("The exception does not allow statements to show *the external cause* of physical sensations."); WEISSENBERGER & DUANE, *supra* note 2, § 803.13 ("Self-diagnostic statements or statements as to the external source of an internal condition are not, however, admissible under *Rule 803(3)* . . . ."); *cf.* FED. R. EVID. 803(4) (creating an exception that allows description of past pain or symptoms if made to receive medical attention).

[17] MCCORMICK, *supra* note 2, at 474; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("[S]uch statements are admissible even though made to a spouse or friend, and need not be made to physicians."); WEISSENBERGER & DUANE, *supra* note 2, § 803.12 ("Rule 803(3) does not require that the statement be directed to, or made in the presence of medical personnel. Any person who had an opportunity to hear it may testify to the declaration, including friends, family, and unrelated bystanders."); *cf.* FED. R. EVID. 803(4) (permitting hearsay statements made in connection with medical care).

[18] FED. R. EVID. 803 ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . . ."); *see* MCCORMICK, *supra* note 2, at 474.

[19] MCCORMICK, *supra* note 2, at 474 (noting when "legal rights and liabilities hinge upon the existence of a particular state of mind or feeling," then "the mental or emotional state of the person becomes an ultimate object of inquiry."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71; WEISSENBERGER & DUANE, *supra* note 2, § 803.14 ("[T]he most probative evidence of a person's mental state is usually the contemporaneous declarations of the person whose state of mind is at issue."). These statements could also meet the definition of party-opponent admissions. FED. R. EVID. 801(d)(2).

[20] MCCORMICK, *supra* note 2, at 474 ("[A statement of state of mind] is not introduced as evidence from which the person's earlier or later conduct may be inferred but as an operative fact upon which a cause of action or defense depends."); *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("[S]tatements are of course excludable when offered for such points in cases where state of mind does not count.").

concern the speaker's state of mind.[21] Like statements in category one, "[t]he guarantee of reliability is assured principally by the requirement that the statements must relate to a condition of mind or emotion existing at the time of the statement."[22] However, courts acknowledge "continuity" in state of mind, knowing that a person can maintain the same mindset.[23] Category two statements should indicate the speaker's state of mind, not that of a third party.[24] Because the statement must parallel state of mind, the speaker's availability is immaterial.[25]

Some statements that appear to fit in category two will avoid hearsay classification. The exception in Rule 803(3) permits admission of direct, assertive hearsay statements about state of mind.[26] As non-hearsay statements, indirect, non-assertive statements do not need to qualify for admission under an exception.[27]

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[21] WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("A statement may be proffered on the theory that it is probative of declarant's then existing state of mind, such as fear, knowledge, or belief, and this state of mind is the issue to be proved.").

[22] MCCORMICK, *supra* note 2, at 475; *see also* FISHMAN, *supra* note 9, at 703 ("[A] contemporaneous statement by the actor that reveals the purpose or reason for the conduct is within the exception . . . .").

[23] MCCORMICK, *supra* note 2, at 475; *see also* FISHMAN, *supra* note 9, at 680 ("[A] state of mind is not necessarily evanescent or ephemeral."); IMWINKELRIED, *supra* note 9, at 12-36 ("[I]f the interval between the operative time and the declaration is short enough, under Rule 401 the court then permits the proponent to draw the permissive inference that the declarant's state of mind was the same at both times."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("[C]ourts generally admit some statements indicative of the mental state in issue even if they were made before or after the moment in question on the assumption that states of mind have a certain degree of continuity. The trial court must decide whether a given statement falls within or without this period of continuous mental process.").

[24] *See supra* note 19 and accompanying text; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Where one party seeks to prove the state of mind of another by the latter's out-of-court statements, the admissions doctrine provides the easiest avenue . . . .").

[25] MCCORMICK, *supra* note 2, at 475 (explaining that statements made at the time provide more accurate evidence than statements at trial subject to cross examination); *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Problems of memory are negligible and problems of perception minimal, and such statements seem better (more reliable, more persuasive) than the next best alternative, which is backward-looking testimony by the person herself . . . .").

[26] MCCORMICK, *supra* note 2, at 474; WEINSTEIN & BERGER, *supra* note 2, § 16.04; WEISSENBERGER & DUANE, *supra* note 2, § 803.14.

[27] *See supra* note 26.

While many category two statements fit within the exception's scope, courts should admit only the relevant statements.[28] To qualify as relevant, the speaker's state of mind must be in dispute.[29] Relevancy concerns often arise about victim statements, usually expressions of fear, in homicide cases.[30] However, a victim's statements receive no special treatment; "[t]he victim's emotional state must relate to some legitimate issue in the case."[31] Because few homicide cases implicate the victim's state of mind, category two statements are generally irrelevant in this context.[32] Additionally, irrelevant category two statements

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[28] MCCORMICK, *supra* note 2, at 475-76, 480; *see also* WEISSENBERGER & DUANE, *supra* note 2, § 803.14 ("*Rule 803(3)* may be appropriately applied wherever the declarant's mental state is relevant."). Further clarification will facilitate discussion about admissibility and relevancy. A hearsay statement, otherwise inadmissible, becomes admissible evidence if it falls within the scope of an exception in Rule 803. *See supra* note 2. When dealing with the Rule 803(3) exception, the statement must fit within category one, two, or three to fall within the exception's scope and avoid exclusion. *Id.* However, after this first step, a statement must clear another hurdle. A hearsay statement must also be relevant to an issue in the case. MCCORMICK, *supra* note 2, at 480. If a hearsay statement fails to satisfy both requirements, a court should not allow it. *Id.*; *see infra* notes 29-31.

[29] FISHMAN, *supra* note 9, at 691 (citations omitted) ("Admissibility depends upon a careful analysis of what the victim said and how the statement is relevant. . . . Common situations include where the victim's state of mind is an element of the crime, cause of action or defense, where a homicide prosecutor offers evidence of the victim's fear of the defendant, when a defendant charged with assault or homicide offers evidence of the victim's animosity toward the defendant, [and] where the victim's statement of intent is a basis to infer that he subsequently did what he said he intended to do.").

[30] MCCORMICK, *supra* note 2, at 480 (noting that a statements of fear by victims "have generally [been] excluded"); *see also* FISHMAN, *supra* note 9, at 692-93 ("It is important to understand, however, that [the victim]'s state of mind is not an element of the crime of homicide. Thus, although *V*'s statement, 'I'm afraid *D* is out to get me,' is relevant evidence of *V*'s state of mind, this does not justify admitting *V*'s statement over a hearsay objection unless *V*'s state of mind becomes a factual issue in the case.").

[31] MCCORMICK, *supra* note 2, at 480 ("A recurring problem arises in connection with the admissibility of accusatory statements made before the act by the victims of homicide. If the statement is merely an expression of fear . . . no hearsay problem is involved, since the statement falls within the hearsay exception for statements of mental or emotional condition. This does not, however, resolve the question of admissibility.").

[32] FISHMAN, *supra* note 9, at 695 ("[I]f the defendant affirmatively puts in issue the victim's state of mind, the state should be permitted to respond with evidence of statements by the victim that contradict the defendant's claim."); 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:3, at 138 (6th ed. 2006) ("However, there are several exceptions to the general rule that a homicide victim's hearsay statements are inadmissible. First, a victim's state of mind is at issue when it goes to a

from a victim could prejudice the jury if admitted against the defendant.[33]

C. Category Three—Statements of Intent

Rule 803(3) permits use of hearsay statements indicating the speaker's intent to act.[34] Put another way, the exception allows statements that look "forward" to events that have yet to occur.[35] Absent an intervening event, the speaker should complete the intent.[36] Even if the speaker might not act on the stated intent,

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material element of the crime. Second, 'the victim's state of mind may become relevant to an issue in the case where the defendant claims: (1) self-defense; (2) that the victim committed suicide; or (3) that the death was accidental.'" (citations omitted)).

[33] GRAHAM, *supra* note 32, at 109 ("Every statement meeting the requirements of Rule 803(3) is subject to exclusion under Rule 403 if after considering the probable effectiveness of a limiting instruction, Rule 105, the incremental probative value of the statement is substantially outweighed by the danger of unfair prejudice or trial concerns."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("In the murder setting, fear on the part of the victim is *not* an element in the prosecutor's case, and the victim's fear instead is *usually* relevant only in suggesting inferences about prior conduct by the defendant."); ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 378 (1998) ("An objection should still be sustained, however, if the state of mind of the declarant is irrelevant, or though relevant, its probative value is outweighed by the danger that the jury will use the out-of-court statement for some purpose other than showing the declarant's state of mind.").

[34] MCCORMICK, *supra* note 2, at 478 ("[S]tatements of intent to perform an act are admissible as proof that the act was in fact done.").

[35] *See infra* notes 52-53 and accompanying text; *see also* FISHMAN, *supra* note 9, at 682 ("[C]ourts also recognize the inference that declarant's state of mind continued for some time after she articulated it, and that she behaved consistently with that state of mind. Thus, a declarant's statement of intent to perform an act in the future is admissible as a basis to infer that she in fact performed the act . . . ."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("The mental state that we describe as 'intent' is by definition forward-looking, and intention is normally a *continuing* condition that begins at some moment of decision and continues until the intended act is accomplished or until something happens that persuades the person to revise or abandon the intent."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[A] plan or intent is a mental state expressly comprehended by *Rule 803(3).*").

[36] GRAHAM, *supra* note 32, at 112 ("The statement of intent as evidence is subject to two weaknesses: (1) the trustworthiness of the declarant and (2) the possibility of change of mind or supervening events to defeat the plan."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:71 ("Whether to admit such a statement depends very much on what the statement actually says about state-of-mind, on what happened in the life of the speaker after the statement was made, on the time lapse between the statement and the occasion of interest to the trier of fact, and on risks of prejudice . . . .").

category three statements run less risk of imperfect recall.[37] The Supreme Court confirmed the admissibility of category three statements in *Mutual Life Insurance Co. of New York v. Hillmon*.[38]

When used as evidence, category three statements show that the speaker carried out the stated intent.[39] As one authority

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[37] MCCORMICK, *supra* note 2, at 476 ("The special reliability of the statements is less in the present situation since it is significantly less likely that a declared state of mind is actually held."); *see also* FISHMAN, *supra* note 9, at 704-05 ("[T]he reliability of the inference (*X* said she intended to do act *Y*, therefore she did act *Y*) is far from certain: *X* may have changed her mind, or events beyond her control may have prevented her from following through."); GRAHAM, *supra* note 32, at 112 ("Consequently, if perception and recollection risks associated with recounting of the past event are held in proper perspective, to allow the declaration of intent as proof of the doing of the intended act is to admit evidence which is arguably inferior to that excluded by the hearsay rule."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("[Juries] are likely to be appropriately skeptical toward statements suggesting forward-looking inferences, because they bring obvious uncertainties that connect with everyday experience . . . ."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 (noting that statements of intent "do not suffer from possible defects in memory" and "are free of risks of defects in perception").

[38] 145 U.S. 285, 295-96 (1892) ("The letters in question were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention."); *see* FED. R. EVID. 803 advisory committee's note ("The rule of *Mutual Life Ins. Co. v. Hillmon* allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed." (citation omitted)); MCCORMICK, *supra* note 2, at 477; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("Hillmon came to stand for the proposition that a statement indicating the intent of the speaker to do something may be admitted as evidence that he later did it."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("*Rule 803(3)* codifies *Hillmon* by classifying a statement of intent as a statement of the declarant's then existing state of mind to which the hearsay rule does not apply."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[T]he Supreme Court, in the landmark case of *Mutual Life Insurance Co. v. Hillmon*, endorsed the use of statements of plan or intent to show that the planned or intended act was undertaken.").

[39] MCCORMICK, *supra* note 2, at 476-78; *see also* FISHMAN, *supra* note 9, at 682 ("[A] declarant's statement of intent to perform an act in the future is admissible as a basis to infer that she in fact performed the act . . . ."); IMWINKELRIED, *supra* note 9, at 12-38 to -39 (stating that "the court permits . . . use [of] the evidence as proof that the declarant in fact committed the act"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 (noting that statements of intent are admissible to show that "speaker later acted accordingly"); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (defining admissible statements as those that create "an inference that the declarant subsequently acted in accordance with the earlier expressed intent"); WEISSENBERGER & DUANE, *supra* note

affirms, "Intent surely does make it more likely that the intended act was done."[40] Because category three statements increase the odds that the speaker acted in accord with the stated intent, these statements meet the relevancy test.[41] Precise, clear statements of intent will face fewer relevancy problems than conjecture about future plans.[42] Like categories one and two, an unavailable declarant is not required.[43]

Category three statements present an interesting problem when used to prove a third party, non-declarant's later actions.[44] A third party, non-declarant's involvement impacts the likelihood that the declarant will successfully execute a plan.[45] While some jurisdictions admit category three statements to establish the

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2, § 803.15 (explaining that the rule permits statements that are "probative evidence of the occurrence of the subsequent relevant conduct").

[40] MUELLER & KIRKPATRICK, *supra* note 2, § 8:72.

[41] MCCORMICK, *supra* note 2, at 476 ("[A] person who expresses an intent to kill is undeniably more likely to have done so than a person not shown to have had that intent. The accepted standard of relevancy, i.e., more probable than with the evidence, is easily met."); *see also* GRAHAM, *supra* note 32, at 112 ("The argument for admissibility is that persons who intend to do an act are more likely to do the act than are persons without the intent, and therefore the evidence of intent is relevant, Rule 401."); IMWINKELRIED, *supra* note 9, at 12-39 ("[T]he declared intent slightly increases the probability of the commission of the act; hence, it is logically relevant, circumstantial evidence of commission."); WEISSENBERGER & DUANE, *supra* note 2, § 803.15 ("[S]tatements of intent, plan, or design unquestionably alter the probabilities of subsequent conduct and are, consequently, relevant under *Rule 401* as to whether the subsequent conduct occurred.").

[42] MCCORMICK, *supra* note 2, at 477.

[43] *Id.*; *see supra* note 18.

[44] *See generally* Joseph A. Devall, Jr., Comment, *Whether Federal Rule of Evidence 803(3) Should Be Amended to Exclude Statements Offered to Prove the Subsequent Conduct of a Nondeclarant: Guidance from Louisiana*, 78 TUL. L. REV. 911 (2004) (arguing against the admission of hearsay statements as evidence of a third party's conduct); Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145 (1991) (arguing for admission of these statements to prove third-party conduct).

[45] MCCORMICK, *supra* note 2, at 477-78; *see also* FISHMAN, *supra* note 9, at 707 ("Hillmon has been read to stand for the proposition that the statement of a declarant manifesting a present intent to perform an act with a second party is admissible to prove the second party engaged in the intended conduct."); GRAHAM, *supra* note 32, at 115 ("Courts faced with deciding whether a statement of intent is admissible as evidence of actions of another under the Federal Rules of Evidence have opted in favor of admissibility.").

third party, non-declarant's conduct, other jurisdictions employ limiting instructions to minimize improper inferences.[46]

Within category three, threats indicate the speaker's intent to take a specific action against another individual.[47] Threats show "the speaker intended to cause harm to another, which supports an inference that he acted in furtherance of that intent."[48] The authorities and courts distinguish communicated threats, where the threat's recipient hears the speaker state the intent, from uncommunicated ones.[49] In self-defense claims, category three statements show the victim's intent toward the

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[46] MCCORMICK, *supra* note 2, at 477-78; *see also* FISHMAN, *supra* note 9, at 708-11 (describing three ways to handle these statements: admission, prohibition, and admission in conjunction with other evidence of cooperation); IMWINKELRIED, *supra* note 9, at 12-41 ("Because one person's state of mind is not reliable evidence of another person's act, the courts insist that the trial judge admit the evidence only to prove the declarant's act under appropriate limiting instructions."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("What someone says can only prove what he and another did if used to support both forward-looking and backward-looking inferences. The forward-looking inference is that the speaker acted in accord with his intent, which is fine. The backward-looking inference is that he had already met the other person when he spoke, that the two had agreed to do something together (the other had spoken words indicating his intent), and that both later acted in accord with these plans. These inferences are *not* fine . . . ."); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (noting that "the federal judiciary has been extremely circumspect about relying on *Rule 803(3)* when the action of a person other than the declarant is at issue.").

[47] MCCORMICK, *supra* note 2, at 478.

[48] MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("Threatening statements also fit the exception, and can be used to prove that the speaker intended to cause harm to another, which supports an inference that he acted in furtherance of that intent.").

[49] In many situations, communicated threats are not hearsay. MCCORMICK, *supra* note 2, at 478; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("If such threats were *communicated to the defendant*, then proof that he heard or was told of them may be admissible because this fact bears on the reasonableness of his later behavior, and hearsay issues can be put aside because the proof involves use of words to show effect on the listener or reader."). Uncommunicated threats must pass through an exception to the hearsay rule. MCCORMICK, *supra* note 2, at 478; *see also* IMWINKELRIED, *supra* note 9, at 12-39 ("[S]ome courts have been reluctant to admit evidence of the victim's uncommunicated threats and have done so only in limited circumstances such as when there is some corroborating evidence, perhaps the defendant's own testimony, that the decedent initiated the fray."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("[E]specially the situation in which the victim in a case of alleged murder or assault uttered threats against the defendant, the state-of-mind exception paves the way to prove those threats as evidence that the victim likely acted on the intent reflected in those threats, regardless whether the defendant knew or heard about the threats.").

defendant and provide an explanation for the defendant's conduct.[50]

D. Category Four—Statements of Memory or Belief

Unlike the forward-looking statements in category three, the Rule 803(3) exception does not pardon statements describing past events or subjective thoughts that comprise category four.[51] The rule and authorities sharply distinguish admissible "forward-looking statements" from inadmissible "backward-looking statements."[52] The Supreme Court confirmed this distinction in *Shepard v. United States*.[53] Similarly, a testator's or testatrix's statements after executing a will receive different treatment and will not be excluded with other category four statements.[54] In addition to reliability concerns, admission of category four statements under Rule 803(3) could eliminate the hearsay rule.[55]

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[50] MCCORMICK, *supra* note 2, at 478; *see also* FISHMAN, *supra* note 9, at 702 ("Where defendant concedes that he was involved in an altercation with *V* and asserts self-defense, statements by *V* as to his or her animosity toward *D* are relevant on the question of who was the initial aggressor, and therefore are admissible."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:72 ("In homicide cases where the accused claims self-defense, threats uttered by *the victim* against the defendant may be critical evidence in deciding who started the affray.").

[51] MCCORMICK, *supra* note 2, at 478-79; MUELLER & KIRKPATRICK, *supra* note 2, § 8:73; PARK ET AL., *supra* note 33, at 272; WEISSENBERGER & DUANE, *supra* note 2, § 803.16.

[52] *See supra* note 2 and accompanying text; *see also* MCCORMICK, *supra* note 2, at 479 ("[F]orward-looking statements of intention are admitted while backward-looking statements of memory or belief are excluded because the former do not present the classic hearsay dangers of memory and narration."); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("Fed. R. Evid. 803(3) and Shepard insist on a bright-line distinction that allows inferences looking forward but not those looking backward.").

[53] 290 U.S. 96, 105-06 (1933) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."); *see* MCCORMICK, *supra* note 2, at 479; *see also* MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 ("Reasonably understood, Shepard condemns the use of the exception to show the speaker's memory of an act, event, or condition, hence to prove any such point. Wills cases apart, Fed. R. Evid. 803(3) takes this position, and for the most part modern courts flatly reject state-of-mind statements when offered for these purposes, not only in the setting of homicide trials where the speaker is the victim, but in other settings as well.").

[54] FISHMAN, *supra* note 9, at 712-13; MCCORMICK, *supra* note 2, at 479; MUELLER & KIRKPATRICK, *supra* note 2, § 8:74.

[55] FED. R. EVID. 803 advisory committee's note ("The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the

Statements of memory or belief evidence "lack . . . of candor, misperception, and faulty memory," which support exclusion.[56]

II. Application of Mississippi Rule of Evidence 803(3)

Mississippi courts frequently encounter statements that implicate the Rule 803(3) exception. While the state's appellate courts have issued several opinions with accurate and conclusive statements of law on this hearsay exception, the courts appear to deviate from the authorities in other cases.[57] Specifically, in cases involving statements of fear and statements from homicide victims, courts have reached different conclusions.[58] A thorough examination of Mississippi cases in each category will fully illustrate instances where Mississippi courts diverge from the authorities set forth above.

A. Mississippi Cases in Category One

Although state appellate courts have ruled on fewer category one statements in comparison to the other categories, the primary category one case, *University of Mississippi Medical Center v.*

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virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."); *see also* GRAHAM, *supra* note 32, at 121 (describing statements that could cause "the effective destruction of the hearsay rule"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 (explaining that these statements would "devour and destroy the hearsay doctrine"); WEINSTEIN & BERGER, *supra* note 2, § 16.04 (noting that statements of past acts could "annihilate the hearsay rule"); WEISSENBERGER & DUANE, *supra* note 2, § 803.16 (stating that these statements run the risk of "emasculating the entire hearsay system").

[56] MUELLER & KIRKPATRICK, *supra* note 2, § 8:73 (listing "lack of candor," "narrative ambiguity," "misperception," and "faulty memory" as dangers associated with backward-looking statements); WEINSTEIN & BERGER, *supra* note 2, § 16.04 ("The blanket exclusion of statements of memory or belief is justified on the ground that the dangers of improper perception, faulty memory and deliberate misstatement are far greater when the statement is being used to prove a past act rather than a future act."); WEISSENBERGER & DUANE, *supra* note 2, § 803.16 (noting the potential for "defects in sincerity, perception, narration, and memory").

[57] *Compare* Harris v. State, 861 So. 2d 1003, 1019 (Miss. 2003) ("This Court has held that M.R.E. 803(3) encompasses relevant statements made by murder victims before their death."), *with* Hall v. State, 39 So. 3d 981, 983-84 (Miss. Ct. App. 2010) (allowing statements that described victim's past acts and the defendant's threats against the victim under the Rule 803(3) exception to show victim's state of mind).

[58] *See infra* notes 69-104 and accompanying text.

Johnson, provides an excellent illustration.[59] The *Johnson* case involved a woman, Brenda Easter, who "did not sleep lying down because when she did she felt as if she were drowning."[60] Easter provided this explanation in response to a fellow patient that asked why she slept in a chair.[61] When the fellow patient later testified, the court of appeals admitted the statement under the hearsay exception in Mississippi Rule of Evidence 803(3).[62]

In this case, the issue was whether Easter made the statements while her condition was then-existing.[63] Because there were no alternative means available to prove Easter's internal feeling and "only the declarant can directly prove internal pain," necessity argued for classification as a category one statement that would be admissible hearsay.[64] Even though Easter did not make the statements at the moment she felt the drowning sensation, her on-going condition also suggested that the statements were close enough in proximity to the feeling to qualify under category one.[65] However, strictly speaking, Easter was not experiencing the drowning sensation at the moment she responded to her fellow patient. Because Easter was sitting in a chair when she made the statement and did not suffer from the sensation while seated, the condition was not then-existing at the time of the statement.[66] Easter's statement was also an inadmissible description and explanation of her past experience.[67] Despite the necessity argument, Easter's statements do not seem to fall within category one and, therefore, could not qualify for admission under the exception in Rule 803(3).[68]

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[59] 977 So. 2d 1145, 1149 (Miss. Ct. App. 2007).

[60] *Id.* at 1148.

[61] *Id.*

[62] *Id.* at 1149.

[63] *See supra* note 9 and accompanying text.

[64] FISHMAN, *supra* note 9, at 686.

[65] *See supra* note 23 and accompanying text; *see also* United States v. Newell, 315 F.3d 510, 523 (5th Cir. 2002) ("Although Cooper could not identify the specific date on which she wrote the notes, she testified that she authored them when the events were still 'fresh in her mind.'"); MUELLER & KIRKPATRICK, *supra* note 2, § 8:70 ("An utterance may fit the state-of-mind exception even . . . without the sort of immediacy of present sense impressions or the impact that produces excited utterances.").

[66] *See supra* notes 9-12 and accompanying text.

[67] *See supra* note 15 and accompanying text.

[68] Easter's statements were likely inadmissible category four statements of memory or belief. *See supra* notes 51-56 and accompanying text.

B. Mississippi Cases in Category Two

For Mississippi courts, category two cases have presented the greatest challenge. State appellate courts have dealt with the two primary subcategories: statements of fear and statements from homicide victims.

1. Statements of Fear

In *Brown v. State*, the Mississippi Supreme Court used the state of mind exception to support admission of potential non-hearsay statements.[69] The hearsay problem in this case centered on in-court testimony from Investigator Mark Berry, who the court instructed not to "say what somebody else said outside court" but permitted to "tell how they appeared."[70] Berry then confirmed that he saw the "physical appearance, mannerism, and actions" of two individuals and concluded "they were both frightened."[71] The supreme court found no error with the trial court's admission of the statements, citing Mississippi Rule of Evidence 803(3).[72]

Examining the supreme court's ruling in *Brown*, two potential issues appear. First, Berry testified about admissible, non-hearsay conduct.[73] The court could have allowed these statements without referencing any hearsay exception.[74] Second, Berry gave testimony in court about the two individuals' states of mind, not his own.[75] The Rule 803(3) exception only permits statements from the declarant about his or her own state of mind.[76]

In *Nichols v. State,* the court of appeals—passing over other applicable hearsay exceptions—also affirmed the trial court's admission of hearsay statements under the Rule 803(3) exception.[77] Witness Terry Baptist said "Jones was 'scared' before

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[69] 890 So. 2d 901, 914-15 (Miss. 2004).
[70] *Id.* at 914.
[71] *Id.*
[72] *Id.* at 915.
[73] *See supra* note 27 and accompanying text.
[74] *See supra* note 27 and accompanying text.
[75] *See supra* notes 70-71 and accompanying text.
[76] *See supra* note 24 and accompanying text.
[77] 27 So. 3d 433, 441-42 (Miss. Ct. App. 2009).

the collision with Nichols" and while listening on the phone "that he heard Johnson in the background stating, 'This crazy blank, blank, blank going to run us . . . trying to run us off the road.'"[78] Testimony from Baptist would be within the exception's scope under category two as evidencing the first victim's frightened state of mind during the car crash.[79] As a non-hearsay statement when offered to prove fear, Baptist's testimony about overhearing the second victim describe contact that pushed the car from the road would not need to gain admission under the exception.[80] In *Nichols*, the defendant's depraved-heart murder case did not involve either victim's state of mind, making neither individual's state of mind at issue in the case.[81] However, these statements were admissible under either the Rule 803(1) exception as present sense impressions or the Rule 803(2) exception as excited utterances.[82]

2. Statements from Homicide Victims

From 1999 to 2003, Mississippi appellate courts authored three opinions containing sound pronunciations of law and excluding irrelevant statements from homicide victims. However, in the last few years, the court of appeals has used these precedents to sanction what is arguably inadmissible hearsay.

a. Instructive Opinions

In *Mosby v. State*, the court of appeals dealt with whether hearsay statements about the victim's fear of the defendant were relevant in a trial for capital murder.[83] Prior to her death, the victim, Gail Mosby, told her attorney that she "disliked" the defendant, Deborah Mosby, and "was afraid" of her.[84] During his testimony, the attorney "never repeated a literal quote by Gail Mosby that she was afraid of or disliked Deborah Mosby. Still, it is difficult to imagine that all this information was gained without

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[78] *Id.* at 442.

[79] *See supra* notes 28-30 and accompanying text.

[80] *See supra* notes 26-27 and accompanying text.

[81] *See supra* notes 20-22 and accompanying text.

[82] MISS. R. EVID. 803(1)-(2).

[83] 749 So. 2d 1090, 1092, 1096 (Miss. Ct. App. 1999).

[84] *Id.* at 1096.

Gail Mosby having made some statements regarding fear and dislike . . . ."[85] The court correctly held that these statements were inadmissible based on lack of relevance and stated, "We see little relevance to the victim Gail Mosby's state of mind."[86] In general terms, the court noted, "We in particular point out that a victim's pre-existing fear of the person accused of her murder is not in most circumstances relevant."[87]

Several months after deciding *Mosby*, the court of appeals issued its opinion in *Walker v. State* and again noted the irrelevance of a victim's state of mind.[88] While serving as an informant, victim Anthony Lloyd told a law enforcement officer that he "had received death threats" from the defendant and another individual.[89] According to the law enforcement officer, "Lloyd was afraid and that . . . [the defendant would] do what was necessary to protect himself."[90] Finding the statements irrelevant in the defendant's murder trial, the court denied admission of the statements under the Rule 803(3) exception.[91] However, the court explained that the statements could be relevant, and thus admissible, if the defendant asserted a self-defense or accidental death claim.[92]

In accord with the court of appeals, the Mississippi Supreme Court's opinion in *Harris v. State* offered an excellent recitation of law that courts in several subsequent cases recycled.[93] In *Harris*,

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[85] *Id.*

[86] *Id.* ("Had that been relevant, then hearsay testimony regarding it was admissible.").

[87] *Id.*

[88] 759 So. 2d 422, 426-27 (Miss. Ct. App. 1999).

[89] *Id.* at 426.

[90] *Id.*

[91] *Id.* at 426-27 ("While evidence of one's state of mind is admissible under M.R.E. 803(3), the evidence of which complaint is made appears to be a combined recitation of Lloyd's state of mind and a recitation of the threats giving rise to his state of mind. Even if we were to hold that the evidence was simply a statement of Lloyd's state of mind, it would still have to pass the relevancy test in order for it to be admissible, and if Lloyd's state of mind were an issue in this case, that would end the matter. However, it is not Lloyd's state of mind but the shooter's identity that is an issue in this case.").

[92] *Id.* at 427; *see supra* notes 48-50 and accompanying text.

[93] 861 So. 2d 1003, 1011, 1018-19 (Miss. 2003). Several subsequent cases have cited and relied on the statement of law in *Harris* without setting forth the relevancy of the victim's statement. *See* Wilson v. State, No. 2010-KA-00139-COA, 2011 WL 5027146, at *18 (Miss. Ct. App. Oct. 18, 2011); Lenard v. State, 77 So. 3d 530, 537 (Miss. Ct. App. 2011); Hall v. State, 39 So. 3d 981, 984 (Miss. Ct. App. 2010); Council v. State, 976 So.

prior to a fight, in which victim Ronnie Travis sustained fatal injuries, the witness testified that Travis said "F-it, man, let's get it on."[94] Finding the statement within the exception's scope, the opinion noted, "This Court has held that M.R.E. 803(3) encompasses relevant statements made by murder victims before their death."[95] The court also specified the statement's relevancy, such as it explained the victim's conduct.[96]

In these three cases, the courts provided textbook examples on how to analyze statements under Rule 803(3). In each case the court first placed the statement within the rule's scope and then addressed the statement's relevancy.[97]

b. Potentially Problematic Opinions

While the courts provided valuable guidance in the above cases, the court of appeals took a different approach in *Hall v. State*.[98] In this case, the victim, Shirley Jobe, made several statements to an acquaintance that "she had recently won a substantial amount of money at a local casino" and "had spent it

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2d 889, 894, 900-01 (Miss. Ct. App. 2007); Dendy v. State, 931 So. 2d 608, 614 (Miss. Ct. App. 2005).

[94] *Harris*, 861 So. 2d at 1011.

[95] *Id.* at 1019 (citing Parker v. State, 606 So. 2d 1132, 1139 (Miss. 1992), *overruled by* Goff v. State, 14 So. 3d 625, 662-63 (Miss. 2009)). The Fifth Circuit has taken a similar position on this issue. *See* Prather v. Prather, 650 F.2d 88, 90 (5th Cir. 1981) ("However, it is clear that before a statement, otherwise hearsay, can be admitted under 803(3) to show the declarant's then existing state of mind, the declarant's state of mind must be a relevant issue in the case."). The *Parker* decision, which the court used to support its holding in *Harris*, involved the admission of a homicide victim's irrelevant statements. *Parker*, 606 So. 2d at 1138-39. In *Parker*, the witness recounted that the victim expressed fear of a third party in the defendant's capital murder trial. *Id.* at 1134, 1138. The court used the Rule 803(3) exception to support admission of the statements, which were arguably irrelevant. *Id.* at 1139 ("That the victim told her friend, Ms. McCarty, that she was afraid Mike was going to beat her because she had been with another man was clearly a statement of her then existing state of mind or emotion. Whether analyzed under M.R.E. 803(24), 804(b)(5), or 803(3), the trial court abused its discretion by preventing the admission of the hearsay statements of the victim.").

[96] *Harris*, 861 So. 2d at 1019 ("In the instant case, the statement Arthur Black overheard Ronnie Travis make to the Harrises just before the fight began is relevant to show that Travis intended to fight and might have been the initial aggressor. It was therefore error to exclude the testimony.").

[97] *See supra* note 28 and accompanying text.

[98] 39 So. 3d at 983-84.

all at the casino."[99] Additionally, Jobe said that the defendant "had threatened to kill her over losing the money . . . when he returned from work."[100] Without much analysis other than to correct the trial court for admitting the statements as present sense impressions, the court affirmed the admission of the acquaintance's testimony under the Rule 803(3) exception.[101] The court did not address the relevance of Jobe's statements to the defendant's manslaughter case and also admitted the defendant's threatening statements to show the victim's state of mind.[102]

In *Lenard v. State*, the court of appeals again used *Harris* to support the admission of the victim's statements in a capital murder prosecution.[103] The witness described statements from victim Katrina Dumas about the plan "to end her relationship with Lenard and [that she] was going to tell him that she was seeing another man."[104] These statements were admissible without reference to *Harris* as category three statements of intent, which are admissible regardless of whether the victim made the statements prior to a homicide.[105]

C. Mississippi Cases in Category Three

Mississippi courts have ruled on category three statements of intent in several contexts, including statements that evidence a plan or design, threatening statements, and statements that implicate third parties. Generally, state appellate courts have had few problems recognizing and then admitting or excluding statements in this category.

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[99] *Id.* at 983.

[100] *Id.*

[101] *Id.* at 984.

[102] *See supra* notes 19, 24 and accompanying text.

[103] 77 So. 3d 530, 537 (Miss. Ct. App. 2011) (quoting Harris v. State, 861 So. 2d 1003, 1019 (Miss. 2003)) ("Haynes testified that Katrina told him of her plan or present intent to tell Lenard she was ending their relationship. Rule 803(3) allows statements of plan or intent, and this 'encompasses relevant statements made by murder victims before their death[s].'").

[104] *Id.*

[105] *See supra* notes 39-42 and accompanying text.

1. Statements Evidencing a Plan or Design

As one of the few reported civil cases to raise hearsay issues under the exception, *Ellison v. Meek* focused on whether statements from a deceased declarant were admissible to show his intent "to acquire title to land by purchasing it . . . rather than acquiring it by adverse possession."[106] The declarant, William Bright, made several statements prior to his death to his neighbor, Buck Meek, about purchasing property to avoid encroaching on Meek's property.[107] The court of appeals correctly admitted Meek's testimony under the exception to illustrate Bright's intent.[108] Because Bright died before purchasing the property, his statements failed to show that he later acted on his stated intent.[109] While the statements appropriately, but not ideally, fit into category three under the Rule 803(3) exception, Rule 804 for statements against interest provides a more apt exception.[110]

The supreme court dealt with a statement from a deceased declarant about her intent to evict the defendant in *McIntosh v. State*.[111] The declarant, Creola McIntosh, told her daughter "about a week before [her] death . . . that she . . . planned to evict [the defendant] from their home."[112] Using the Rule 803(3) exception, the trial court allowed McIntosh's daughter to testify.[113] The testimony concerned McIntosh's intent to evict the defendant at some point in the future, placing the statement within the exception's scope under category three.[114] Because the statement increased the likelihood that McIntosh later acted on her intent, relevancy concerns were absent.[115] The supreme court determined that the trial court erred in admitting the statement.[116] However,

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106 820 So. 2d 730, 734-38 (Miss. Ct. App. 2002).

107 *Id.* at 738.

108 *Id.* ("The chancellor did not abuse his discretion in allowing this hearsay testimony as the testimony presented was restricted to Mr. Bright's state of mind.").

109 *See supra* notes 37, 39-41 and accompanying text.

110 MISS. R. EVID. 804(b)(3).

111 917 So. 2d 78, 82-83 (Miss. 2005).

112 *Id.* at 82.

113 *Id.*

114 *See supra* notes 34-38 and accompanying text.

115 *See supra* notes 39-41 and accompanying text.

116 *McIntosh*, 917 So. 2d at 83.

the trial court correctly admitted the statement in this instance.[117]

In *Sherrell v. State*, the supreme court distinguished two inadmissible hearsay statements from a third statement, which the Rule 803(3) exception permitted.[118] Witness Buddy Brock first testified that victim Bobbie Boone made statements describing past arguments she had with the defendant, Thomas Sherrell.[119] Next, Boone told Brock that she feared Sherrell would harm her if she asked him to move from her residence.[120] The court held that the statements were "inadmissible as . . . attempt[s] to show her state of mind prior to her death."[121] In her third statement, Boone said to Brock "that she intended to ask Sherrell to leave."[122] The court allowed this statement, which showed Boone's intent.[123]

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[117] The supreme court relied on a prior court of appeals opinion to support its ruling. *Id.* at 82-83; Edwards v. State, 856 So. 2d 587, 591-93 (Miss. Ct. App. 2003). Unlike *McIntosh* where the declarant made a statement of personal intent, *Edwards* involved a statement from the declarant that guessed at the defendant's intent. *Edwards*, 856 So. 2d at 592 ("During his testimony, Hayes explained that when the victim asked for his assistance in removing Edwards from his home, the victim stated, 'I want you to come get my son out of the house because he is going to hit me in the head and take my money.'"). The *McIntosh* court could have distinguished the statement in *Edwards*, which that court excluded. *Id.* ("Thus, Rule 803(3) is not a viable avenue for admission of the hearsay statement."). By contrast, the supreme court reached a different conclusion on a similar issue in a previous case. McLeod v. Allstate Ins. Co., 789 So. 2d 806, 808, 811 (Miss. 2001). In *McLeod*, a father's affidavit claimed that his daughter intended to re-establish her residence in his home prior to her death. *Id.* at 808, 811. Using the Rule 803(3) exception, the court allowed the affidavit. *Id.* at 811. Because the father stated his belief about an intent that his daughter never verbalized, the court could have excluded the affidavit. *Id.* at 811, 813-814 (Smith, J., dissenting) ("These affidavits are mere hearsay as her father and brother would not be allowed to testify to Matia's intent at trial.").

[118] 622 So. 2d 1233, 1236-37 (Miss. 1993).

[119] *Id.* at 1236. The court addressed these two statements as a single declaration from Boone. *Id.* The author separated the statements for discussion purposes.

[120] *Id.*

[121] *Id.* The first statement was inadmissible as a category four statement of Boone's memory or belief. *See supra* notes 51-53 and accompanying text. Inadmissible based on irrelevance, the second statement went to Boone's state of mind as the victim. *See supra* notes 28-32 and accompanying text.

[122] *Sherrell*, 622 So. 2d at 1237.

[123] *Id.* ("Boone's statement to Brock that she intended to ask Sherrell to leave is admissible under Miss.R.Evid. 803(3) because it responds to Sherrell's contention that Boone gave him things to pawn. Boone was frightened for her life by the person whom she was sharing a trailer. Although she was scared to return with Sherrell there, she was just as scared to ask him to leave. Therefore, Brock's testimony as to Boone's state of mind was both relevant and admissible under Miss.R.Evid. 803(3)."); *see also* United

However, in dissent, Justice Banks raised concerns about whether "the majority sanction[ed certain] testimony by referring to a part of Boone's statement that was admissible."[124]

2. Statements Implicating Third Parties

With some category three statements, an issue arises about using the declarant's statement of intent to establish the actions of a third party.[125] In *Bogan v. State*, the issue was whether to use the declarant's statement to his girlfriend about "his intent to pick 'Jerry' [Bogan] up on his way to work" as evidence in Bogan's trial for robbery and murder.[126] Allowing the declarant's statement of intent to place Bogan at the scene of the crime, the court of appeals stated, "The language of Rule 803(3) says that statements of intent are admissible. By its terms, the rule does not limit the class of person's [sic] statements of intent may be admitted against."[127]

3. Threatening Statements

The opinion from the court of appeals in *Sanders v. State* offers guidance on how to treat threats under Mississippi Rule of Evidence 803(3).[128] The defendant, Edna Mae Sanders, threw hot cooking oil on the victim, Sherman Sanders, and received a murder charge when Mr. Sanders's injuries proved fatal.[129] On the night he sustained these mortal injuries, Mr. Sanders made threats on Mrs. Sanders's life, and these threats led Mrs. Sanders

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States v. Donley, 878 F.2d 735, 738 (3d Cir. 1989) ("The motive for murder was contested. The appellant claimed that he killed his wife because he had found her with another man. The government claimed, however, that the defendant killed her because of the imminent marital separation. The government was entitled to introduce testimony from which the jury might reasonably infer the existence of the motive the government proposed . . . ."); *see supra* notes 34-38 and accompanying text.

[124] *Sherrell*, 622 So. 2d at 1239 (Banks, J., dissenting) ("Boone's statement that she intended to ask Sherrell to leave is admissible and supplies a motive for Sherrell's action. It does not follow, however, that her statement concerning her beliefs and fears is admissible. This is a statement of 'belief to prove the fact . . . believed' explicitly inadmissible under our rules of evidence.").

[125] *See supra* notes 44-46 and accompanying text.

[126] 754 So. 2d 1289, 1290, 1293 (Miss. Ct. App. 2000).

[127] *Id.* at 1293; *see* Devall, *supra* note 44, at 930.

[128] 77 So. 3d 497, 499, 507 (Miss. Ct. App. 2011).

[129] *Id.* at 499.

to fear him.[130] Finding that the trial court committed a reversible error in refusing to admit the threats, the court of appeals noted that the statements were crucial to explain that Mr. Sanders planned to cause the harm implied in his threats and the actions Mrs. Sanders took in response.[131]

D. Mississippi Cases in Category Four

As the only inadmissible category under Rule 803(3), statements of memory or belief have posed fewer problems for Mississippi courts. The Mississippi Supreme Court examined "statements made by [a] child to two social workers, her mother, and to her grandparents describing [an] event of sexual abuse some days or weeks *after* it is said to have occurred."[132] The court refused to admit the statements under the exception in Rule 803(3).[133] In *Ben v. State*, the victim told the witness that the defendant raped her.[134] The court of appeals prohibited admission of the witness's statement about the rape under Rule 803(3).[135] These cases provide cut-and-dried examples of standard backward-looking statements that the exception in Mississippi Rule of Evidence 803(3) does not allow.[136]

IV. RECOMMENDATIONS

While Mississippi's appellate courts apply the Rule 803(3) exception accurately in most cases, there is room for improvement. Specifically, statements of fear and statements from homicide victims have presented the most trouble. For an immediate

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[130] *Id.* at 507.

[131] *Id.* ("The [trial court's] suppression of this evidence prevented the jury from fully understanding Sherman's state of mind and intention to kill Sanders, Sanders's state of mind during the attack, and the grounds for her reasonable apprehension that she and her children were in serious imminent danger."); *see supra* note 50 and accompanying text.

[132] *In re* Interest of C.B., 574 So. 2d 1369, 1371-72 (Miss. 1990).

[133] *Id.* at 1372. However, the statements would be admissible under the tender years exception. MISS. R. EVID. 803(25).

[134] No. 2009-CA-01495-COA, 2011 WL 2120090, at *1, 4 (Miss. Ct. App. May 31, 2011).

[135] *Id.* at *4 ("The statement is a statement of belief to prove a fact believed by the victim, but it does not relate to the execution, revocation, identification, or terms of the victim's will.").

[136] *See supra* notes 51-53 and accompanying text.

change, the courts could directly address the relevancy of these statements. In addition to the dearth of relevancy considerations about statements indicating state of mind, appellate courts frequently offer brief explanations on any statement falling within the scope of Rule 803(3). The insufficient analysis contained in many existing cases leaves little guidance for courts and practitioners. An increase in reported opinions correctly applying the Rule 803(3) exception would benefit trial judges and lawyers, who need instructive precedent when making evidentiary determinations. Properly admitting or excluding statements under the exception will maintain and promote the integrity of the judicial process.

CONCLUSION

As the above discussion illustrates, Mississippi courts have cited the Rule 803(3) exception in several cases to allow arguably inadmissible hearsay statements. Proper application of this exception in accord with the authorities analyzing Rule 803 will ensure that proceedings involve only permissible statements and reach unassailable conclusions.

Charles W. Francis III[*]

* The author would like to thank Professor Robert Weems for suggesting this topic and his assistance throughout the process of drafting this Comment.

FULFILLING THE PROMISE OF "ONE PERSON, ONE VOTE": ELIMINATING THE LEGAL FICTION OF THE TEN-YEAR MINIMUM FOR REDISTRICTING UNDER *REYNOLDS*

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INTRODUCTION

On October 31, 2011, the United States Supreme Court summarily affirmed the lower court's decision in *NAACP v. Barbour*,[1] a case appealed from a three-judge court of the Southern District of Mississippi pertaining to the time by which the Mississippi Constitution requires the state legislature to redistrict itself.[2] In doing so, the Court passed up an opportunity to revisit the question of how frequently congressional and state legislative districts must be redistricted since it first set the constitutional minimum of once per decade, with little other guidance, nearly fifty years ago in *Reynolds v. Sims*.[3]

The plaintiffs asserted that because the Mississippi legislature voluntarily refused to redistrict before the 2011 state elections, after having received the population data from the decennial 2010 U.S. Census, Mississippi violated the Equal Protection Clause by allowing the dilution of votes for the 2011 elections of those living in malapportioned districts under the old district maps.[4] The three-judge court found that under the current constitutional test, Mississippi was within its right not to redistrict until the 2012 legislative session since, because of its similar delay following the 2000 census, it had redistricted only nine years earlier in 2002.[5] Besides the normal shifts in population, which occur in any jurisdiction between censuses, Hurricane Katrina made a huge impact on Mississippi's population, but those major shifts were not accounted for in the 2011 elections even though 2010 census data was available. Without question, the voters of Mississippi are today not given equal voice in their state legislature.[6]

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[1] NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011).

[2] NAACP v. Barbour, 132 S. Ct. 542 (2011) (mem.).

[3] 377 U.S. 533 (1964).

[4] *NAACP*, 2011 WL 1870222, at *1.

[5] *Id.*

[6] For example, according to the 2010 census, DeSoto County, Mississippi is now the third most populous county in the state and grew by 54,053 individuals (50.4%). *See State & County QuickFacts: Desoto County, Mississippi*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/28/28033.html (last visited Apr. 18, 2011). Similarly, Lamar County, Mississippi increased by 16,588 individuals (42.5%) most likely as a result of migration after Katrina, yet these dramatic shifts were not accounted for before the 2011 elections. *See State & County QuickFacts: Lamar County,*

Since the Court's decision in *Reynolds* nearly a half century ago, each jurisdiction is required to redistrict only once every ten years. This standard allows an individual's vote to be diluted over the intervening decade as populations shift in a given jurisdiction, resulting in a "legal fiction"[7] that districts are equal in population. This Comment proposes the Court should revisit the standard so as to more aptly guarantee the promise of "one person, one vote"[8] in the context of today's reality by reducing the constitutional minimum for redistricting to once every five years for both congressional and state legislative districts, accompanied by strict limitations on ad hoc redistricting at any other time.

A comparison of Indiana's population between 2000 and 2010 serves as an example of the innate harm caused by the ten-year minimum standard. Indiana has nine congressional districts, and the state has seen a 6.6% growth in population over the last ten years, as reflected in the 2010 federal census.[9] For the congressional districts to be equal in population, each district should contain 720,420 citizens, yet the most populous district contains approximately 809,402 (over twelve percent higher than the mean) and the least populous, only 676,422 (over nine percent lower than the mean).[10] If such a disparity existed between districts after a decennial redistricting had taken place, the congressional districting regime would unquestionably be deemed unconstitutional;[11] but because these dilutions occurred within the decade between censuses, the Court would rely on the self-

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Mississippi, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/28/28073.html (last visited Apr. 18, 2011).

[7] LULAC v. Perry, 548 U.S. 399, 405 (2006) (citing Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003)).

[8] This phrase, which has generally come to be known as the theme of the redistricting revolution, is often thought to have come into being through the *Baker v. Carr* opinion. *See* Baker v. Carr, 369 U.S. 186 (1962). The phrase was actually first written by Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in which the Court ruled that the practice of the State of Georgia of aggregating popular votes in each county and then awarding the election to whichever candidate received the highest number of counties was unconstitutional. *Id.*

[9] Rachel Justis, *Uneven Population Growth Means Significant Changes Ahead for Indiana's Legislative Districts*, IN CONTEXT, http://www.incontext.indiana.edu/2011/mar-apr/article3.asp (last visited Apr. 18, 2012).

[10] *Id.*

[11] *See infra* Part II.B.

labeled legal fiction of continued population equality to justify the dilution of one person, one vote as each decade proceeds.

The idea that one person's vote should be given equal weight as that of his or her neighbor is the very foundation of representative government at the local level and the cornerstone of the House of Representatives.[12] This was apparent to the Founders and the reason for which the census was included in the Constitution.[13] The principle is so important that Chief Justice Earl Warren wrote in his memoirs that *Baker v. Carr*, the touchstone of the "one person, one vote" canon, was "the most important case of my tenure on the Court."[14] The Court recognized that other elements such as political stability and technology play an important role in the redistricting process but that population equality must be the dominant factor and ultimate goal in redistricting.[15]

Part I of this Comment will explore the historical background of redistricting and the seminal cases leading to what is commonly known as the "redistricting revolution" through the issuing of a series of cases which enshrined the idea of "one person, one vote" in the early 1960s. This historical background will be followed by a summary of the few cases where plaintiffs have actually claimed their rights were violated because of the timing of redistricting.

Part II will lay out the argument that the current ten-year minimum standard needs to be revised because advancements in collecting and synthesizing data and creating districts with mathematical precision since 1964 should induce the Court to consider a revision of the ten-year minimum just as it has for the other aspects of the "one person, one vote" doctrine. The Court has revisited other aspects of the doctrine such as the practicability of population equality between districts, political gerrymanders, and minority voting rights, but it has never again visited the question of how frequently a state must redistrict. Further, the Court's sanctioning of voluntary mid-decade redistricting in *LULAC v.*

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[12] "State legislatures are, historically, the fountainhead of representative government in this country." Reynolds v. Sims, 377 U.S. 533, 564 (1964).

[13] *See infra* Part I.A.

[14] Bernard Schwartz, *How Justice Brennan Changed America*, *in* REASON AND PASSION 31, 33 (E. Joshua Rosenkrantz & Bernard Schwartz eds., 1997).

[15] *Reynolds*, 377 U.S. at 579-80.

Perry is certain to give rise to increased litigation and political instability, which a new five-year standard, including limitations on ad hoc redistricting, would reduce to a large degree. Additionally, the legal assumptions about common state practices which the Court reasonably relied upon in crafting the ten-year minimum in 1964 are no longer valid. Finally, this Section will address some of the concerns which may arise by adoption of the proposed rule.

Part III will describe the five mechanisms by which a new five-year minimum standard could be implemented and present alternative remedies that, while not adhering to the five-year rule proposed in this Comment, would be an improvement on the current standard.

I. BACKGROUND

A. The Path to Revolution

Embodied in the debates of the Constitutional Convention is the idea that apportionment of seats in the House of Representatives must accurately reflect the population in the several states.[16] In assuring that an accurate count of the population was maintained for apportionment purposes, Edmund Randolph proposed a periodic census to ensure "fair representation of the people."[17] The Constitution thus contained such a provision requiring a census to be conducted within the first three years of the first meeting of Congress and "within every subsequent Term of ten years, in such Manner as they shall by Law direct."[18] The Constitution allowed the states to determine the time, place, and manner by which senators and representatives would be elected, but explicitly reserved the right of Congress to make or alter such regulations—except in regard to the place of choosing representatives.[19] Therefore, states were free to decide whether electives would be chosen at large or by any

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[16] Wesberry v. Sanders, 376 U.S. 1, 10 & n.16, 11 (1964).

[17] *Id.* at 13.

[18] U.S. CONST. art. I, § 2, cl. 3. This enumeration was to be an adding of free persons excluding indentured servants, Indians not taxed, and only three-fifths of all other persons (slaves). *Id.*

[19] U.S. CONST. art. I, § 4, cl. 1.

number of districting systems, how those districts would be formed, and how frequently they would be redistricted.

From the ratification of the Constitution until the mid-nineteenth century, the federal government allowed the states to freely determine how their representatives were chosen.[20] Through their individual constitutions, statutes, and independent means of gathering population, states determined how their congressional delegations and state legislators were selected.[21] When citizens brought suit for the failure of a state to redistrict in accordance with state or federal law, the Supreme Court repeatedly deferred to the states and found claims arising under the Equal Protection Clause or Article I as lacking.[22]

B. The Revolution: Baker, Wesberry, *and* Reynolds

In 1962 the Supreme Court decided malapportioned districts or the failure to redistrict were not simply political questions inappropriate for consideration by federal courts, but were in fact justiciable issues under the Fourteenth Amendment's Equal Protection Clause.[23] Plaintiff Charles Baker asserted that since the Tennessee General Assembly had not redistricted since 1901, in deliberate violation of Tennessee law, urban areas which had experienced increased population growth during the ensuing decades were now underrepresented in the Tennessee General

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[20] As late as 1842, seven states elected representatives at large. *Wesberry*, 376 U.S. at 9 n.11. In 1967 Congress enacted legislation requiring that districts be established for purposes of electing representatives and that no district should send more than one representative to Congress, but left the boundaries of such districts to be determined by the individual states. 2 U.S.C. § 2(c) (2006).

[21] For historical background on state censuses and developments in the timing of state redistricting, see Richard Gladden, *The Federal Constitutional Prohibition Against "Mid-Decade" Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133 (2005); Justin Levitt & Michael McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO L.J. 1247 (2007).

[22] Colegrove v. Green, 328 U.S. 549 (1946) (ruling that under Article I only Congress could determine whether individual state legislatures had fulfilled their duties pertaining to fair and equal representation); Wood v. Broom, 287 U.S. 1 (1932) (ruling that because the Reapportionment Act of 1929 did not require districts be compact or contiguous, as did the Reapportionment Act of 1911, the Court would not override the intent of Congress).

[23] Baker v. Carr, 369 U.S. 186, 198-99 (1962).

Assembly.[24] The Court's landmark decision, siding with Baker, opened the door for citizens to assert their claims to equal protection of voting rights in federal court.[25]

In 1964 the Supreme Court built upon the foundation of justiciability it laid in *Baker* by issuing its decisions in *Wesberry v. Sanders* and *Reynolds v. Sims*.[26] *Reynolds* is particularly relevant to this Comment because it was in that case the Court addressed the question of how frequently redistricting must occur in order to pass constitutional muster. The Court stated that at a minimum, redistricting must occur at least once every ten years, and that any redistricting occurring with less frequency would be "constitutionally suspect."[27]

In *Wesberry*, the Court, relying on Article I, Section II of the Constitution, required that congressional districts be constructed so that each would be equal in population as "nearly as is practicable."[28] Similarly, the *Reynolds* Court applied the same "practicable" mandate to the redistricting of state legislatures and also found that the Fourteenth Amendment's Equal Protection Clause required that population be the primary factor in determining legislative districts.[29]

C. After the Revolution: The Voting Rights Act, The Rise of the Gerrymander and Narrowing "Practicable"

Although the Court's "one person, one vote" canon focused on equality of population in legislative and congressional districts,

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[24] *Id.* at 192-93.

[25] The *Baker* decision did not grant declaratory relief to the plaintiff but remanded with instructions back to the district court. The decision is monumental because the Supreme Court for the first time stated that issues regarding legislative redistricting could now be heard by federal courts. The specific doctrines which would arise out of the "one person, one vote" canon would be developed in subsequent cases.

[26] Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[27] *Reynolds*, 377 U.S. at 584.

[28] *Wesberry*, 376 U.S. at 7-8.

[29] *Reynolds*, 377 U.S. at 577. The Alabama legislature also proposed that, based upon the model of the federal government, it was permissible to allow the state house of representatives to be based upon population and the state senate to be comprised of one or two senators per county. *Id.* at 571-72. The Court declared that each house of a state legislature must be based upon population. *Id.* at 573. Although these two cases dealt with congressional and state legislative districts, the Court applied the population standard on all public elections including school board, city council, and judicial elections. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970).

three subsequent issues, sometimes overlapping with one another, came to dominate election litigation over the next several decades: (1) the Voting Rights Act, (2) political gerrymandering of districts, and (3) the narrowing and defining of the practicability standard of equality between districts under *Reynolds*.[30]

Regardless of the Court's pronouncements that each citizen's vote should be given equal voice, they were not enough to prohibit states from circumventing the law and systematically disenfranchising the rights of minorities.[31] Seeing the need for an aggressive legislative response to these actions, Congress passed the Voting Rights Act (VRA) in 1965, which ensured the permanence of majority-minority districts by requiring that states with a history of racial prejudice submit redistricting plans to the Justice Department for approval or face the prospect of the federal judiciary creating districts for them.[32] Over the last forty-five years since the VRA was passed and subsequently reauthorized, many cases have been brought either challenging its validity or claiming that a state or locality is in violation of the statute.[33]

Similarly, as states were compelled to redistrict on a regular basis, districts began to take on very awkward shapes with the purpose of solidifying the influence of one party or another in a given district. Subsequently, lawsuits were filed claiming that such overtly political "gerrymanders," created with the goal of prohibiting one group from acquiring power, were unconstitutional.[34]

The third issue on which election law litigation has focused is the practicability standard first promulgated in *Wesberry*, and

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[30] CHARLES L. ZELDEN, THE SUPREME COURT AND ELECTIONS: INTO THE POLITICAL THICKET 40-86 (2010).

[31] *Id.* at 283.

[32] 42 U.S.C. § 1973 (2006).

[33] *See generally* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Morse v. Republican Party of Va., 517 U.S. 186 (1996); Holder v. Hall, 512 U.S. 874 (1994); McCain v. Lybrand, 465 U.S. 236 (1984); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[34] For a discussion of the development of gerrymandering after the mid-1960s, see CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA (2010).

then applied to state legislative redistricting in *Reynolds*.[35] As precision in counting the populace has increased with technological advancements over the ensuing decades since these two cases were decided, the Court has narrowed the definition of what is an acceptable deviation in population between both congressional and state legislative districts under this standard.[36]

D. The Federal Courts Decline to Revisit the Question of Frequency

At present, only five federal court cases have directly addressed the question of redistricting frequency in isolation from other issues.[37] Ironically, even though the foundational cases of *Baker, Wesberry*, and *Reynolds* focused attention on the relation between redistricting frequency and the population equality between districts—and the three cases are cited in virtually all redistricting cases which have made their way through the federal courts—plaintiffs have very rarely made arguments for increased frequency to obtain equality in population between both state legislative as well as congressional districts.

The first two cases in which plaintiffs did so involved redistricting on the municipal level. In both *Ramos v. Illinois* and *French v. Boner*, the plaintiffs asserted that city elections taking place in 1991 were unconstitutional because the more accurate 1990 census data was available.[38] Even though 1990 census data was available, the municipalities were holding elections under districts created by reliance on 1980 population statistics because the municipalities claimed there was not enough time after

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[35] Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("[W]e mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) ("We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

[36] *See infra* Part II.B.

[37] *See* LULAC v. Perry, 548 U.S. 399 (2006); NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LF-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011); Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993); French v. Boner, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd*, 963 F.2d 890 (6th Cir. 1992); Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff'd*, 976 F.2d 335 (7th Cir. 1992).

[38] *French*, 786 F. Supp. at 1329; *Ramos*, 781 F. Supp. at 1354.

release of the data to redistrict before the scheduled elections.[39] Thus, officials would be governing in 1995 based upon fifteen-year-old census data.

The Sixth and Seventh Circuits, respectively, upheld the rulings of the district courts and their interpretation of the ten-year minimum as promulgated by *Reynolds*.[40] In both instances, the courts stated that although the Census Bureau released the 1990 census data before the 1991 elections, such an occurrence did not require a special judicial remedy every time jurisdictions did not receive data in time for a scheduled election.[41] Additionally, the Sixth Circuit cited the "settled expectations of voters and elected officials" and the costs of elections as reasons to affirm the lower court's decision.[42] The former is not a reason explicitly enumerated by *Reynolds* as an acceptable factor in determining whether to provide a judicial remedy, and the latter is explicitly proscribed.[43]

The third case is *Fairley v. Forrest County*, arising from the Southern District of Mississippi. In this instance, the district court relied on the *Reynolds* standard as in the previous two cases, but also took into account the fact that the county board of supervisors attempted to redistrict before elections in 1991, but was unable to do so because the Justice Department refused to pre-clear the new plan.[44] Even so, the district court relied on the reasoning of the *Boner* and *Ramos* courts and refused to grant any judicial relief to make the districts more equal in population.[45] It would not be

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[39] *French*, 786 F. Supp. at 1333; *Ramos*, 781 F. Supp. at 1357.

[40] *Ramos*, 976 F.2d at 341; *Boner*, 963 F.2d. at 892.

[41] *Id.* These cities had very similar voting cycles so that every twenty years, those elected would begin four-year terms of office based on data collected more than ten years earlier.

[42] *Boner*, 963 F.2d at 892.

[43] *Reynolds*, 377 U.S. at 579-580 ("But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.").

[44] Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993). As in the *Boner* and *Ramos* cases, plaintiffs filed suit claiming that the 1991 elections were based on 1980 data and thus diluted the voting strength of African Americans in Forrest County. *Id.* at 1328. Ironically, the delay in pre-clearance under the VRA caused the 1991 elections to be held under the 1980 plan and resulted in the type of African American vote dilution the VRA was designed to prevent.

[45] *See infra* note 62 and accompanying text.

until 2006 that the Supreme Court would consider the question of frequency.

The fourth instance of plaintiffs asking the courts to look at the frequency of redistricting involved both a claim of an unconstitutional gerrymander as well as a claim that a mid-decade redistricting itself was unconstitutional.[46] However, the frequency question in *LULAC v. Perry* was secondary to the primary issue of whether the Texas Legislature created an unconstitutional gerrymander under the Court's test in *Davis v. Bandemer*. Nevertheless, this is the only case to reach the Supreme Court since *Reynolds* that dealt directly with the question of frequency in isolation from other issues. The main difference between *LULAC* and the previous three cases where plaintiffs were advocating for more frequent redistricting, is that the plaintiffs in *LULAC* asked the Court to rule a mid-decade redistricting *unconstitutional.*

The plaintiffs in *LULAC* claimed that Texas failed to meet the Court's test for gerrymanders it created nearly twenty years earlier.[47] In 1986 the Supreme Court recognized that political gerrymandering claims were justiciable under the Equal Protection Clause, but established that a plaintiff must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" for a gerrymander to be deemed unconstitutional.[48] Since the Court issued its *Bandemer* test not a single federal court on any level has declared a redistricting plan to be an unconstitutional gerrymander.[49] Critics of the *Bandemer* test believed that when the Court granted certiorari to hear *LULAC*, the best chance of finding such a gerrymander unconstitutional presented itself.[50]

LULAC v. Perry was unique to gerrymander litigation because it involved a dominant party (the Republicans) deciding to redistrict in 2003 or "mid-decade," just after obtaining a majority in both houses of the Texas Legislature as a result of the 2002

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[46] LULAC v. Perry, 548 U.S. 399 (2006).

[47] *Id.* at 400.

[48] Davis v. Bandemer, 478 U.S. 109, 127 (1986).

[49] Alex Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 213 (2009).

[50] *LULAC*, 548 U.S. 399.

elections.[51] Plaintiffs alleged that mid-decade redistricting solely initiated by political motivation was sufficient to meet the *Bandemer* burden.[52] However, Justice Kennedy writing for the Court stated:

> The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.[53]

While the focus of the *LULAC* decision was on whether gerrymanders were constitutional, the Court's validation of mid-decade redistricting at any time initiated a host of mid-decade redistricting efforts for political purposes in many states by giving its blessing to redistricting.[54] Although the Court addressed whether a mid-decade redistricting *could* occur, it is important to note that the Court did not revisit the constitutionality or practicality of the ten-year minimum. The importance of *LULAC* for this Comment is that the Supreme Court affirmed the right of a state to redistrict mid-decade, and in doing so, triggered a new wave of political gerrymanders around the country.

The final case in which plaintiffs directly addressed the timing of redistricting was decided by the United States District Court for the Southern District of Mississippi in *NAACP v. Barbour*. This case differs from the four previous federal cases in that the first three were concerned that due to time constraints, caused either by Justice Department approval or simply the timing of elections, voters were electing officials before it was feasible to redistrict based on new data; and *LULAC* dealt with

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[51] *Id.* at 399-400.

[52] *Id.* at 416-17. Plaintiffs also made a VRA claim which the Court reversed and remanded in part and affirmed in part. *Id.* at 400. However, as VRA claims are irrelevant to the focus of this Comment, discussion on those claims has been omitted.

[53] *Id.* at 418-19. After the 2000 election, Republicans controlled the state senate but not the state house of representatives. *Id.* at 411. Consequently, the legislature could not agree on a redistricting plan based on 2000 census data and a court-ordered plan was put in place until the 2003 redistricting in question. *Id.*

[54] Levitt & McDonald, *supra* note 21, at 1248. Colorado, Georgia, New Hampshire, North Carolina, and South Carolina drew new congressional or state legislative district boundaries while others made inroads into doing the same. *Id.*

redistricting within the ten-year window. Conversely, in *NAACP v. Barbour*, the Mississippi State Legislature received census data in February of 2011, and the Standing Joint Legislative Committee on Reapportionment created a redistricting plan which both houses of the legislature had ample opportunity to modify and pass; yet the legislature failed to pass identical plans through both chambers.[55]

The plaintiffs alleged that such action, causing 2011 elections to then be held under 2000 census data, was unconstitutional and requested interim judicial relief.[56] The three-judge court, finding that since it had been only nine years since Mississippi previously redistricted itself, relied on the *Reynolds* ten-year minimum and declined to issue an interim redistricting plan.[57] As a result, Mississippians voted for state legislators in November 2011 based upon data from the 2000 census. Therefore, as these newly elected officials serve their respective terms in office, Mississippi will be governed by officeholders which were elected based upon data that will eventually be fifteen years old at the end of their terms in 2015.

II. ARGUMENT

It is true that in the few instances where the lower federal courts have considered the possibility of a judicial remedy for elections held outside the ten-year window, they have uniformly failed to provide one. This is not an issue on which the federal courts are split. Nevertheless, the antiquated current minimum dilutes the voting strength of citizens throughout the country, and the Supreme Court should revisit the issue. Since 1964 Congress has created a new mid-decade census, the computer age has simplified and streamlined the redistricting process, and what the Court considered common practice by the states no longer holds

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[55] No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222, at *3-4 (S.D. Miss. May 16, 2011).

[56] *Id.* at *5. The result of holding elections in 2011 under 2000 census data would be the same as that in *Ramos* and *Boner*.

[57] *Id.* at *1-2. The Mississippi Constitution provides that within two years of the state's receiving the federal census data, the legislature must redistrict itself. MISS. CONST. art. 13, § 254. Since the previous redistricting took place in 2002, the court held that the legislature was within its self-imposed ten-year window and its ability to redistrict sooner was moot. *NAACP*, 2011 WL 1870222, at *1-2.

true. This Comment seeks not to overturn *Reynolds* as a whole or claim that the Court's original decision was misguided, but to urge the Court to revisit the ten-year minimum and apply the same reasoning to its revision as it has for other aspects of the one person, one vote doctrine.

With the Court's increasing intolerance over even the smallest of disparate population differences between districts, combined with advances in technology, a new mid-decade federal census, easy utilization of data by the states and the likelihood of an increase in mid-decade redistricting since *LULAC*, it is time for a reassessment of the ten-year minimum.

This Comment proposes that the best standard to adopt is a reduction of the constitutional minimum from ten years to five accompanied by strict prohibitions on ad hoc redistricting at other times.

A. Fulfilling "One Person, One Vote": The Lower Courts' Misinterpretation of the Reynolds *Decision*

The inevitable result of adhering to the ten-year minimum is that in the decade between redistricting, the mobile citizenry makes the previous districting plan gradually less equal, thereby granting more weight to the votes of citizens in less populous districts for each election held during the ten-year window between censuses. The Court has called this ever-increasing disproportionate impact on the equality of votes the "legal fiction" that districts are constitutionally apportioned throughout the decade.[58]

For instance, in *Fairley* the district court sanctioned the use of an admittedly unconstitutional malapportioned redistricting plan—which was purely the result of shifts in population over the previous decade—as the basis for new elections even though new census data was available.[59] In that case the county board of supervisors attempted to redistrict based upon new 1990 census data in time for the 1991 elections, but the plan was not approved by the Justice Department under the VRA.[60] Both parties agreed

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[58] *LULAC*, 548 U.S. at 421 (quoting Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003)).

[59] Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993).

[60] *Id.*

there was a population deviation of over twenty-five percent in 1991 under the old plan, which jurisprudence makes clear is constitutionally prohibited under the Equal Protection Clause.[61] Yet, the district court refused to order a special election because it viewed the deviation—though admittedly unconstitutional—as "de minimis," and because the Forrest County Board of Supervisors acted in good faith and were bound by the VRA.[62]

Although the Supreme Court clearly believed in 1964 that the ten-year minimum was acceptable even if it led to "some imbalance in the population of districts toward the end of the decennial period,"[63] the Court said nothing about elections held *outside* the decennial period. It seems the Court did not recognize that due to four-year election cycles in many states and localities, every twenty years—due to the timing of the release of census data—such a locality would hold elections based on census data more than a decade old even though more recent data was available.[64] Further, with many states allowing themselves a two-year timeframe in their state constitutions in which to redistrict themselves, it is not uncommon for states to hold elections outside the decennial period, just as occurred in Mississippi in 2011.[65]

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[61] *Id.* at 1336 (citing Connor v. Finch 431 U.S. 407 (1977); Mahan v. Howell, 410 U.S. 315 (1973)).

[62] *Fairley,* 814 F. Supp. at 1345-46. The district court found that since courts have consistently held that the extent of the deviation and other equitable considerations should be taken into account when deciding whether or not a districting scheme was unconstitutional, the circumstances of this case, particularly the size of the deviation and the amount of time needed by the board to comport with the provisions of the VRA, allowed the twenty-five percent deviation to stand. *Id.* at 1330. The court also erroneously relied on the reasoning of the *Boner* and *Ramos* courts for its conclusion that special elections are not needed every twenty years for those jurisdictions which hold elections in the first odd-numbered year after census data is collected. *Id.* at 1343. In those cases the jurisdictions did not have access to the new data in order to draw new districts before the elections, which is clearly not the case here.

[63] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

[64] *See* LULAC v. Perry, 548 U.S. 399 (2006); NAACP v. Barbour, No. 3:11cv159-TSL-EGJ-LG-MTP, 2011 WL 1870222 (S.D. Miss. May 16, 2011); Fairley v. Forrest Cnty., 814 F. Supp. 1327 (S.D. Miss. 1993); French v. Boner, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd,* 963 F.2d 890, 891 (6th Cir. 1992); Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff'd,* 976 F.2d 335 (7th Cir. 1992). The Supreme Court cannot be completely blamed for this occurrence. The law that standardized the release of census data to the states and created the mid-decade census was not enacted for over a decade after the decision in *Reynolds.*

[65] *See supra* Part I.C.

With its noted concern about disproportionate voting strength within the ten-year window, it seems that elections being held outside the window would not comport with the Court's mandate. Yet, by allowing states to tie the minimum to when they redistrict and not to the point in time when they receive census data, the lower courts have expanded the original meaning of ten years to include any intervening time between a state's receiving and utilization of the data.[66]

Though the Court set a strict standard of ten years for mandatory redistricting of state legislative seats, it recognized that what counted as constitutionally equal populations between state legislative districts was different than the standard for congressional districts: "Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation."[67]

The Court recognized that variations in legislative district shape among the states and the larger number of legislative seats compared to those of a state's congressional districts required some flexibility for the judiciary to administer the Court's practicability standard on a case-by-case basis.[68] However, when cases such as *Fairley* and *NAACP v. Barbour* involving redistricting frequency have come before the courts, the judiciary has failed to apply the practicability standard to the facts before it, even when the courts have initially believed some judicial intervention to be necessary.[69] Thus, the lower courts have not tailored the standard on a case-by-case basis as the Court envisioned in *Reynolds*.

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[66] *See supra* Part I.C.

[67] Reynolds v. Sims, 377 U.S. 533, 578 (1964) (stating that, in regard to state legislative apportionment, more flexibility should be allowed in determining what is practicable population disparity between districts); *see also supra* Part I.C.

[68] *Reynolds*, 377 U.S. at 578.

[69] *NAACP*, 2011 WL 1870222, at *2 ("We initially expressed our inclination to impose an interim remedy, ordering the Mississippi Legislature to redistrict."). The district court seems to have been initially inclined to present a judicial remedy to the petitioners because Mississippi voluntarily declined to redistrict before the 2011 elections, but in the end the court relied on the fact that it had only been nine years since Mississippi had last redistricted. *Id.* at *1.

B. The Need for the Courts to Recognize the Impact of Frequency on the Practicability Standard

In *Wesberry*, the Court stated, in reference to selecting members of the House of Representatives, that "chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[70] Further, the Court concluded:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.[71]

The Court applied this practicability standard to redistricting of state legislatures as well in *Reynolds*:

> By holding . . . both houses of a state legislature must be apportioned on a population basis, we mean the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable.*[72]

It is important to note that this standard of practicability has also been recognized by Congress. Although Congress enacted legislation requiring a practicable standard by which districts were to have equal populations as early as 1872, these equitability requirements were either not enforced, as seen in the opinions of the landmark cases, or were simply omitted all together in future apportionment statutes.[73]

The practicability standard as applied to population equality between districts is one that has flowed consistently though the

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[70] Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964).

[71] *Id.* at 18.

[72] Reynolds v. Sims, 377 U.S. 533, 577 (1964) (emphasis added).

[73] Levitt & McDonald, *supra* note 21, at 1252.

case law.[74] To be sure, this standard is one of *practicability* and not *possibility*, as indicated by the *Reynolds* opinion.[75] The Court has, however, taken into account what is now technologically possible in narrowing the practicable standard. As increases in data collection and the ability to synthesize and count individuals has increased, so have the lengths to which states must go to meet the practicability standard.[76]

For example, in *Karcher v. Daggett* the Supreme Court invalidated New Jersey's 1982 congressional redistricting plan—which contained a combined deviation of 0.698%—because, the Court reasoned, even minimal deviations in population must result from a good faith effort to achieve equality and be necessary to achieve a "legitimate state objective."[77] The Court relied on this precedent when in *Vieth v. Pennsylvania* it found a nineteen-person deviation between congressional districts was sufficient enough to warrant adjudication by the federal courts.[78]

While the practicability standard for state legislative districts is not as high as that for congressional districts, it also

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[74] *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 54 (1970) ("This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's."); Richard L. Engstrom, *Missing the Target: The Supreme Court, "One Person, One Vote," and Partisan Gerrymandering*, *in* REDISTRICTING IN THE NEW MILLENNIUM 313 (Peter F. Galderisi ed., 2005); Richard L. Engstrom, *The Post-2000 Round of Redistricting: An Entangled Thicket within the Federal System*, 32:4 PLUBIUS: J. FEDERALISM 51 (2002).

[75] *Reynolds*, 377 U.S. at 577 ("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.").

[76] Although *Reynolds* allowed more flexibility in population equity for state legislative districts than congressional districts, the practicability standard for both has become far more rigorous. Engstrom, *Missing the Target*, *supra* note 74, at 319-21.

[77] Karcher v. Daggett, 462 U.S. 725, 741 (1983).

[78] Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002), *appeal dismissed sub nom.* Jubelirer v. Vieth, 537 U.S. 801 (2002). The Republican Caucus of the Pennsylvania House of Representatives appealed the decision of the district court on two claims: (1) the partisan gerrymander was unconstitutional and under *Bandemer* produced an actual injury to a particular group of people; and (2) the population disparity of nineteen persons violated the Equal Protection Clause. The Court dismissed the gerrymander claim but stated that the population disparity should be adjudicated at the trial level. A trial was held and the jury found that a nineteen-person deviation in population did indeed violate the Equal Protection Clause. *Vieth*, 195 F. Supp. 2d at 675.

has been narrowed by the Court. After a series of cases in the 1970s and early 1980s which attempted to define the limits of this flexibility,[79] the Court stated as a general rule that "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations . . . . A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[80] Even if a plan does not exceed the ten percent threshold, a plaintiff is still able to rebut the presumption that the plan is constitutional.

As recently as 2004, the Supreme Court upheld a three-judge court finding that a plan with a combined deviation of 9.98% violated the Equal Protection Clause.[81] Using the criteria enumerated by the Court in *Karcher*, the three-judge court found that the Georgia legislature had not redistricted in a manner using the traditional criteria as stated in *Karcher*, or in a manner which furthered a legitimate or rational state interest.[82] For redistricting of both congressional and state legislative districts, the Court has not only narrowed the scope of what a state may call a "practicable" discrepancy in deviation from population equality, but it has also placed a burden on the state to justify those acceptable levels of deviation.

Although the Court has narrowed "practicable" in terms of population equity isolated from the question of redistricting frequency, it is anathema that with the development in data collection and synthesis that the Court would narrow what is "practicable" in terms of population inequality between districts, but not recognize that the infrequency in redistricting is a direct cause of such unconstitutional deviations. The same reasoning

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[79] *See* Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973).

[80] Brown v. Thomas, 462 U.S. 835, 842-43 (1983). The practical meaning of this 10% rule is that no two districts when combined may have a combined deviation of more than 10%. For example, if district X has a 4.99% negative deviation from the ideal district, and district Y has a 4.99% positive deviation from the ideal district, this would not be a prima facie case of unconstitutional redistricting.

[81] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D Ga. 2004), *aff'd sub nom.* Cox v. Larios, 542 U.S. 947 (2004).

[82] *Larios*, 300 F. Supp. 2d at 1350-54. The *Karcher* Court listed the goals of making districts compact, respecting municipal boundaries, preserving the cores of previous districts, and avoiding contests between incumbents that might justify discrepancies in population equity. Karcher v. Daggett, 462 U.S. 725, 740 (1983).

which led the Court to reject the notion, in light of technological advancements, that "[m]athematical exactness or precision is hardly a workable constitutional requirement"[83] should also lead the Court to conclude the practicability and ease of redistricting, which was not present in 1964, demands that the ten-year minimum be reassessed. The frequency standard should be updated analogous to how the Court has treated the practicable standard in light of technological and census-taking advances.

C. The Role of Technology in Redistricting

The *Reynolds* Court recognized that redistricting is not a static procedure bound by the restrictions of the nineteenth century, but that the appropriate form of redistricting is directly related to technological capabilities: "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can validly be based solely on geographical considerations."[84] Further, in *Karcher*, the Court recognized: "The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has."[85] Since 1964 there have been major advancements in the collection and synthesis of data and the use of computer technology in counting the population, and the Court has continuously included these considerations in determining whether a redistricting plan is constitutional.

1. Congress Creates a Mid-Decade Census

First, Congress and the Census Bureau have made extreme changes in how and when population data is collected in the nearly half century since *Reynolds* was decided. In 1976 Congress enacted legislation that standardized the process by which the Census Bureau would reapportion the House of Representatives.[86]

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[83] Reynolds v. Sims, 377 U.S. 533, 577 (1964).

[84] *Reynolds*, 377 U.S. at 580.

[85] *Karcher*, 462 U.S. at 733.

[86] 13 U.S.C. § 141(d) (2006).

Additionally, this legislation required the Census Bureau to conduct a mid-decade census which would be used for all federal program administration and allocation of funds, except reapportionment or redistricting of congressional seats.[87] The flexibility in the statute has allowed the Commerce Department to develop collection methods which operate throughout the year and disseminate such information to the states and localities on a regular basis.[88] Although Congress periodically adopts census legislation, most of this legislation pertains to funding the Census Bureau and ensuring that it has the resources necessary to fulfill its mandate. Congress has not materially altered the method by which the Census Bureau collects information or apportions House seats since enactment of the 1976 statute.[89]

Although this act passed in the 1970s, it was an idea which had been debated in Congress for over one-hundred years.[90] The act requires that in the administration of any federal program, the most recent of the two censuses should be relied upon for the basis of distributing resources: "[T]he determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used."[91]

Yet, the very next section prohibits the use of the mid-decade census data from being employed by the states in prescribing congressional districts or the reapportionment of representatives in Congress among the states.[92] It is odd that Congress realized the need for a more frequent population count and believed the accuracy of a mid-decade count to be such that every federal program should rely on its numbers, except that of

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[87] *Id.*

[88] *American Community Survey: When to Use 1-Year, 3-Year, or 5-Year Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/guidance_for_data_users/estimates/ (last visited Apr. 18, 2012).

[89] Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 337-38. Although the majority of the current census act became positive law in 1954, the last major alteration to the law was the 1976 act. Pub. L. No. 94-521, § 7(a), 90 Stat. 2461 (Oct. 17, 1976) (originally enacted on Aug. 31, 1954, ch. 1158, 68 Stat. 1019; codified as amended at 13 U.S.C. § 141(d) (2006)).

[90] President Grant communicated such an idea to Congress in his Fifth Annual Message to Congress. Gladden, *supra* note 21, at 1140 n.30.

[91] 13 U.S.C. §141(e)(1)(B) (2006).

[92] 13 U.S.C. §141(e)(2) (2006).

reapportionment and redistricting of congressional seats.[93] In crafting the ten-year minimum the *Reynolds* Court noted that since reapportionment occurred every ten years based upon the decennial census data, it was a rational approach to redistrict a state legislature in a ten-year cycle as well.[94] It only goes to reason that with a new mid-decade census, just as accurate as the decennial census, the Court would find it rational for a narrowing of the frequency standard to reflect such changes in data collection and availability.

2. New Advances in Collecting and Utilizing Data

Second, in addition to receiving more reliable and accurate census information from the federal government, states have now fully integrated their redistricting with new computer technology which can allow pin-point precision in drawing lines, tabulating new votes, and synthesizing data. Although redistricting computer systems existed in the 1960s, they did not have the capabilities necessary to quickly analyze changes in district boundaries.[95] In the mid-1990s only some states had redistricting programs running on mainframe computers or state-of-the-art workstations.[96] The software development and compilation of data cost an average of $500,000 with some states spending millions of dollars on new systems.[97] Today, all fifty states use redistricting software, and the majority use commercially available programs capable of running on the common desktop.[98]

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[93] The natural counterargument to this proposition is that the Constitution requires an "actual enumeration," thereby prohibiting the use of any statistical sampling in reapportionment of congressional seats among the several states. The House of Representatives attempted to have this very question answered in *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). However, the Court resolved the issue through statutory interpretation and declined to address the constitutional issue. *Id.* at 343. Even if the Court were to side with the House in this matter and rule that such sampling cannot be used for apportionment, it does not mean the mid-decade census could not still be used for redistricting purposes because the Constitution leaves the method of selecting representatives to the states.

[94] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

[95] Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 78 (2010).

[96] *Id.*

[97] *Id.* at 78-79.

[98] *Id.* at 79.

The advent of geographic information system (GIS) software has allowed the elimination of all deviations by linking population with geography.[99] Before the computer age, states would employ cartographers to manually draw lines on large maps, which due to constraints on time and resources would allow only so many drafts of a redistricting plan, with the cartographer frequently working with precincts—containing somewhere between 1000 to 2000 voters—as the smallest political unit.[100] Conversely, GIS technology uses the census block as the smallest political unit, which in some cases is no larger than one city block, typically contains less people than a precinct and is easily divisible if need be.[101] With the federal government's constant collection of data and the easy access to highly sophisticated computer software of all fifty states—both of which did not exist at the time *Reynolds* was decided—it seems that were the Court to revisit the issue, these factors would support a narrowing of the ten-year minimum, just as they have for a narrowing of the equal population practicability standard.

D. Increases in Mid-Decade Redistricting and Political Instability in the Wake of LULAC

The *Reynolds* Court recognized in crafting the ten-year standard that it would not be practical or efficient to impose a constitutional requirement of annual or biennial redistricting.[102] Limitations on such frequency are justified in the interest of political stability.[103] Though states did not tend to redistrict themselves that frequently in 1964, such redistricting is on the rise nation-wide after the Supreme Court condoned such action in 2006. Adoption of a five-year minimum with limitations on ad hoc redistricting at other times would eliminate the increase in political instability that comes with redistricting that is too frequent.

After Republicans took control of both houses of the Texas Legislature in the 2002 elections, the new majority set about

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[99] BULLOCK, *supra* note 34, at 39.

[100] *Id.*

[101] *Id.* at 40.

[102] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

[103] *Id.*

redistricting the state's congressional districts in order to solidify the Republican domination of the delegation in future elections.[104] The Supreme Court held that such action, motivated primarily by political desires to entrench a majority in power, was in fact constitutional and did not meet the burden of unconstitutionality as set forth in *Bandemer*.[105] As a result, several states around the country began to initiate redistricting efforts.[106]

The Court's decision shifted the responsibility of determining how often within the ten-year minimum a state may redistrict to the states themselves. These types of redistricting battles will now be fought in state courts and depend heavily on the wording of state constitutions and statutes.[107] With the decision in *LULAC*, a state could hypothetically redistrict five times in ten years if the majority in the legislature changed with every biennial election, leading to the kind of political instability discouraged by *Reynolds* and not advocated for in this Comment.[108]

If such action seems to be unlikely, it is not without precedent. When the Speaker of the U.S. House of Representatives, Samuel Randall, encouraged his home state of Ohio's Democratically-controlled legislature to gerrymander its congressional seats mid-decade so as to leave the delegation firmly in Democratic hands, it did so.[109] Consequently, when the Republicans took over the legislature, they immediately tried to reverse the Democrats' redistricting scheme with their own partisan gerrymander.[110] The continuous partisan turnover of the legislature resulted in seven mid-decade redistrictings between

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[104] *See supra* notes 51-52.

[105] *See supra* notes 52-53 and accompanying text.

[106] *See supra* note 54 and accompanying text.

[107] Levitt & McDonald, *supra* note 21, at 1249. On the same note, the *LULAC* decision all but assured that there will be no plaintiff or claim that can successfully meet the *Bandemer* test because of the Court's disagreement over which substantive standard to apply to determine justiciability; and Justice Kennedy explicitly states the opinion will not attempt to clarify that dispute. LULAC v. Perry, 548 U.S. 399, 400 (2006) (plurality opinion).

[108] *Reynolds*, 377 U.S at 583. ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system . . . . [I]n substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.").

[109] Gladden, *supra* note 21, at 1139.

[110] *Id.*

1878 and 1892, with six consecutive congressional elections conducted under new districting plans.[111]

Unfortunately, the language used by the states which dictates when redistricting of both congressional and legislative seats is to occur, more times than not, is ambiguous and leaves open the possibility of redistricting at any time and, consequently, increased amounts of litigation.[112]

Although both cases were decided before *LULAC*, the events in Nebraska and Colorado illustrate what can occur when this type of ambiguity exists. The Colorado General Assembly redrew the state's congressional districts in 2003 to replace a court imposed plan just as the Texas Legislature had done the very same year.[113] There the Colorado Supreme Court looked to the language of the state constitution and decided that when a time frame is specified for redistricting (in this case every ten years), the implication is that it may not occur at other times.[114]

In Nebraska, the Douglas County election commissioner announced plans to redraw Omaha City Council districts before the April 2001 primary elections using 1990 census data because 2000 census data would not be available until March—which would be too close to the elections to use for redistricting purposes.[115] The Nebraska Supreme Court relied on the following statutory language governing districting of political subdivisions:

> [S]uch districts shall be substantially equal in population as determined by the most recent decennial federal census. Any such political subdivision . . . shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the

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[111] *Id.*

[112] For a thorough comparison of state constitutional language, see generally Levitt & McDonald, *supra* note 21.

[113] David J. A. Bargen, Note, *The Frequency of Redistricting in Nebraska and the Balance Between One Person, One Vote and Electoral Stability: How Often is Too Often?*, 82 NEB. L. REV. 575, 577 n.4 (2003).

[114] *Id.*

[115] *Id.* at 579-83.

> legislative bill providing for reestablishing legislative districts.[116]

In light of there being no specific language in the statute prohibiting more frequent redistricting, the Nebraska Supreme Court, in contrast to the Colorado Supreme Court, saw the six-month language following an enabling act as setting a minimum amount of redistricting, not a provision for a once-in-a-decade mandate.[117] Although the Colorado decision dealt with congressional districts, and the Nebraska courts were dealing with the redistricting of internal political subdivisions, these cases illustrate the instability for redistricting across the board that will only now escalate after *LULAC*.

Further, only fourteen state constitutions mention the timing of congressional redistricting with some of those explicitly allowing redistricting at any time.[118] Although, as in the case with Nebraska, the Kentucky Supreme Court followed suit and interpreted the absent restrictive language to allow redistricting at any time, this leaves thirty-four states without provisions governing the timing of *congressional* redistricting which, without remedy, will surely become the new legal battlegrounds with the rise of mid-decade redistricting.[119]

In contrast to the timing of congressional redistricting, every state except Michigan has language regarding the timing of state legislative redistricting. But again, the language is often ambiguous.[120] Although some states explicitly through their constitutions allow their respective legislatures to redistrict at any time[121] the majority of the remaining states contain the same type of ambiguous language that neither explicitly denies nor permits redistricting more than once per decade.[122] Additionally, on the rare occasions when attorneys general or state supreme courts

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[116] *Id.* at 585.

[117] *Id.* at 587.

[118] Levitt & McDonald, *supra* note 21, at 1258-59. The South Carolina and Wyoming constitutions make it clear that congressional districts may be redrawn at any time the legislature sees fit. *Id.* at 1146 n.53.

[119] *Id.* at 1259.

[120] *Id.* at 1258.

[121] Mississippi, Tennessee, South Carolina, and Vermont. *Id.* at 1259 n.54.

[122] *Id.* at 1266. Only ten states have unambiguous constitutional language that clearly restricts redistricting to once per decade. *Id.* at 1260.

have interpreted these ambiguous provisions, states have been split between those states which view ambiguous language to be implicitly restrictive or permissive in nature.[123] A new five-year standard with strong prohibitions on annual, biennial, or other arbitrary redistrictings will eliminate the uncertainty of when elections may occur while allowing each citizen's vote to be counted more equally.

E. The Court's Reliance on State Practices: A Second Look

It is important to note that the *Reynolds* Court looked to the constitutions of the several states in determining that ten years was the constitutional minimum by which states must redistrict. The Court stated:

> Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance . . . .[124]

This analysis deserves some attention because the ten-year minimum now applies to both congressional as well as state legislative redistricting, and states with "silent" provisions on redistricting can no longer be viewed as one homogenous group as the Court viewed them in 1964.

Although the ten-year minimum, as written in *Reynolds*, dealt with redistricting of state legislatures—which is why the Court only analyzed state *legislative* reapportionment provisions among state constitutions—the standard has been understood to apply to both congressional and state legislative redistricting. A federal statute now requires decennial reapportionment by the Census Bureau, but the statute is silent with regard to how the

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[123] Louisiana, Nebraska, and Georgia have adhered to the permissive interpretation while Colorado, California, New Hampshire, South Dakota, and Wisconsin have viewed the provisions as more restrictive. *Id.* at 1263-65. It is important to note that these courts and attorneys general are not interpreting static language in each case. Each state constitution is, of course, worded in a way which is unique unto itself. Therefore, it is very difficult to identify a national trend in which way courts are leaning in the matter.

[124] Reynolds v. Sims, 377 U.S. 533, 583 (1964).

states are to construct their districts or how frequently they can be modified; thus, the method of selecting the congressional delegation is left to the states.[125] Therefore, since the ten-year minimum is now understood to apply to both federal and state redistricting, it is appropriate to assess not only state constitutional provisions governing legislative reapportionment and redistricting, as the *Reynolds* Court did, but provisions regarding *congressional* redistricting as well.

First, the Court's assertion that forty-one states follow the practice of tying their redistricting efforts to the federal census in 1964, while facially valid, is also somewhat misleading. For example, states like Tennessee, South Carolina, and Vermont contained explicit language allowing their respective legislatures to redistrict at any time, yet were included in the court's group of forty-one.[126] Additionally, the majority of state constitutions in 1964, as today, did not proscribe redistricting more than once per decade, but were simply silent on the issue.

Second, since there have been multiple attempts in many of these "silent" states which the court initially included in its count of forty-one to redistrict mid-decade, it seems that these states can no longer be placed in the once-per-decade column. Although the state courts have split over whether or not such action is permissible under their respective state laws, it is an indicator that the legislatures in several of the states the Court included in its count did not take the same limiting view as the Court did. In fact, today only nineteen states, either through constitutional language or by state court ruling, are explicitly prevented from redistricting their legislature mid-decade, while eleven states have explicitly permitted it through the same mechanisms.[127] With twenty states remaining silent on the issue, it is no longer appropriate to say the majority of states tie their redistricting efforts exclusively to the decennial federal census.

Last, since the majority of states have deliberately chosen not to tie their congressional redistricting to the federal census as some have with legislative redistricting, the Court should look to this fact as an indicator of what a new minimum standard should

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[125] *See supra* Part I.A.

[126] *See supra* text accompanying note 124.

[127] *See* Levitt & McDonald, *supra* note 21.

be.[128] It is also of interest that even in some states which have explicitly prohibited redistricting more than once per decade, many of them have taken the opposite view when considering the redistricting of congressional seats.[129] In light of the developments in redistricting both for congressional and legislative districts, the Court should consider that the forty-one state majority it relied on in *Reynolds* no longer exists.

F. Answers to Possible Concerns

The two natural objections to such a new standard are (1) cost concerns and (2) an increase in political instability or disconnect between an elected representative and his or her constituency because of more frequent adjusting of legislative borders.

To the first point, the Supreme Court made it clear in *Reynolds* that economic interests cannot be relied upon to justify disparities in population-based representative government.[130] Although there may be administrative overhead in implementing this new standard, it would pale in comparison to costs imposed on states in the wake of the *Reynolds* decision in 1964. States were compelled to redistrict, often for the first time in decades, which required the hiring of cartographers and specialized experts for an extended period of time.[131] Further, the *Reynolds* court required states not to simply spend the money once, but every ten years as well. If that financial burden was not onerous enough to make the Court curb its pronouncement, the one which would result from adoption of the rule proposed in this Comment certainly would not rise to that standard.

Further, from a policy perspective, the administrative cost would be minimal. With the use in all fifty states of precision-point software usable on any given consumer laptop, and its ability to adjust borders quickly, there is no need for states to hire additional specialists simply because they would be required to

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[128] *See supra* text accompanying note 115.

[129] New Hampshire, North Carolina, Illinois, and New Mexico either redistricted in the wake of *LULAC* or expressed interest in the possibility. Levitt & McDonald, *supra* note 21, at 1248.

[130] *See supra* note 43 and accompanying text.

[131] *See supra* Part II.B.

redistrict twice as often as today.[132] The largest costs associated with adoption of a five-year minimum would be for the given election official to give notice to those citizens affected by any shift in borders.

To the second point of increased political instability or disconnect between the elected official and the citizenry, there are several ways in which such a new minimum standard would not only fail to increase instability, but may actually strengthen the connection between a citizen and his or her elected officeholder.

First, redistricting every five years will minimize the impact of redistricting by the very fact that population has not shifted as greatly in five years as it naturally has in ten. It is common sense to assume that there will be greater changes in population equality between districts over a ten year period than over one of only five years. Therefore, a redistricting that takes place after only five years will result in much less dramatic changes in district boundaries than one that takes place after ten.

Second, much of the problem regarding the dramatic changes in district boundaries, with or without the adoption of this proposed new standard, is the fault of gerrymandering. It is this practice which keeps districts from being compact and community centered, not the frequency by which the boundaries are redrawn. If jurisdictions were to alter the way in which they draw districts so as to make the process less political, the issue of disconnect between voter and officeholder would be mitigated drastically and alteration of boundaries would be far less dramatic. In a less politicized district map with subtler boundary changes due to a more frequent redistricting standard, it only goes to reason that voters would have more connection with their representative when realizing their votes are counted more equally and that their district is not created for the benefit of one political party but for the benefit of the citizens themselves.

Finally, no federal or state legislative office has a term longer than four years.[133] Therefore, no elected office would always be

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[132] *See supra* Part II.B.

[133] *Number of State Legislators and Length of Terms (in years)*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=22258 (last visited Apr. 18, 2012). Senators of course are elected to six-year terms, but as they are elected to represent an entire state, redistricting is not relevant to that body.

subject to redistricting within every term, thus maintaining political stability in the election process. Although some state legislative offices elected to four-year terms would occasionally receive increased redistricting as a result of such a standard, any drawbacks of such a slight increase in instability would be outweighed by the benefits of increasing the equality in weight of each citizen's vote.

III. PATHWAYS TO REFORM: THE COURT, CONGRESS, AND THE STATES

A. Implementation

There are five possible ways by which such a five-year minimum could be implemented: (1) The Court could reassess the standard on its own by hearing an appeal similar to that of *NAACP v. Barbour* and requiring a new rule for both congressional and legislative redistricting; (2) Congress, through its Article I power, could implement such a new minimum standard which would apply to congressional redistricting; (3) Congress could enact legislation requiring states to use the new data to redistrict their legislatures; (4) states could amend their state constitutions to adopt a new standard for both congressional and legislative districts; or (5) state supreme courts could require the new minimum for the redistricting of state legislatures by interpreting a state's refusal to do so when more accurate data is available as a violation of the Fourteenth Amendment's Equal Protection Clause or as a violation of state constitutions which contain equal protection clauses.

To the first option, the Court would need to hear an appeal from a three-judge court. Since the standard as discussed applies to both congressional and legislative redistricting, the Court would need to distinguish both *Reynolds* and *Wesberry* just as it has when the Court has narrowed the practicability standard regarding equal population between districts. The Court may establish the same standard for both, or give state legislative redistricting more flexibility as it has with the practicability standard.

Option two, although unlikely given the House of Representatives' response to using the mid-decade census for

redistricting, would be the easiest way to adopt a new standard for congressional redistricting.[134] Such authority is clearly evident in Article I, Section 4. This action would also naturally include a repeal of the provision prohibiting use of the mid-decade census for redistricting.

The restriction on states present in the statute also raises constitutional concerns. If, for example, a state wanted to redistrict five-years into the decade and use the most current federal census data available to it, the state would be proscribed by law from doing so. Therefore, if Congress believes—as it most certainly does as evidenced by the statute—that the more recent of the decennial or mid-decade census is most accurate in its reflection of population information at a given time, yet denies its use for congressional redistricting, it can be argued that Congress is depriving citizens of equal protection under the Fifth Amendment, thus triggering a strict scrutiny analysis of the statute.[135] The Census Bureau has used its authority under the statute to expand its data collection and dissemination with use of the American Community Survey which releases five-year, three-year, and one-year estimates.[136]

Option three is slightly more complex. For Congress to assert such control over the state legislatures would certainly give rise to litigation regarding the rights of the states to determine for themselves the redistricting policies of their legislative bodies. Congress would need to show that, in exercising its power under Section 5 of the Fourteenth Amendment, the burden of a newly imposed rule would be proportional and congruent to the injury sought to be prevented.[137] Since the injury of vote dilution is made plain by the evidence and there is ample means to remedy such

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[134] *See supra* notes 86-92 and accompanying text.

[135] *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (articulating the idea that the Fifth Amendment's Due Process Clause imposes on the federal government the same equal protection standard as the Fourteenth Amendment). The Court most recently reiterated its adherence to this doctrine in *Adarand Constructors, Inc. v. Pena.* 515 U.S. 200, 217 (1995) ("Equal Protection analysis under the Fifth Amendment area is the same as that under the Fourteenth Amendment." (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976))).

[136] *American Community Survey: When to Use 1-Year, 3-Year, or 5-Year Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/guidance_for_data_users/estimates/ (last visited Apr. 18, 2012).

[137] City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

dilution, it would be within Congress's power to enact such legislation.

Regarding unilateral state action, such a mid-decade congressional redistricting would only achieve the goals discussed in this Comment if Congress were to repeal the prohibition on using mid-decade data for redistricting purposes. Otherwise, like Texas in *LULAC*, a state would be redistricting based on the decennial data and would accomplish nothing in terms of making new districts truly equal in population. If Congress did not repeal the statute, a state could supplement the federal census data with its own state administered data collection. There is a long history of states enumerating their citizens in addition to the federal census data.[138] Although in the current economic climate of strained budgets in many states, this avenue seems unlikely.

With the rise of mid-decade redistricting and the resulting increase in litigation at the state level, the final option of state supreme courts asserting such a rule for their jurisdictions is a very real possibility. The only constitutional concern is whether a state supreme court can develop a redistricting standard pertaining to electing members of Congress apart from the legislative branch since Article I, Section 4 gives power to the "legislatures" and not the states in general.[139] Justice Stevens recognized this mechanism as being possibly unconstitutional in his dissenting opinion in *California Democratic Party v. Jones*, and the majority opinion did nothing to contradict this assertion.[140] However, in light of the Court's decision in *LULAC*, which gave all but exclusive jurisdiction to the states in determining the ultimate timing of redistricting within each decade, it seems likely that the Court would defer to a state

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[138] A state census was not unheard of earlier in the country's history. Tennessee, although admitted in 1796 as the sixteenth state in the union, began enumerating its citizens in the late nineteenth century. Baker v. Carr, 369 U.S. 186, 189 n.4 (1962). Only Maine, New Hampshire, New York, and Ohio now explicitly allow supplementation of the census data with a state census. *See* Levitt & McDonald, *supra* note 21, at 1258 n.48. Additionally, both New York and Pennsylvania enumerated their respective citizenries and redistricted mid-decade as early as the nation's founding. *See* Gladden, *supra* note 21, at 1148.

[139] U.S. CONST. art. I, § 4, cl. 1.

[140] 530 U.S. 567, 602 (2000) (Stevens, J. dissenting) ("[I]t is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.").

court's judicial pronouncement, especially if issued through the lens of a state constitution's equal protection clause.

B. Alternative Standards for Improving Frequency Standard

Although this Comment proposes a five-year minimum as the ideal standard by which states must redistrict, other less dramatic approaches, while not as potent, would be an improvement from the current standard.

The most basic alteration would be to link the *Reynolds* ten-year minimum for state legislative redistricting to the collection or dissemination of federal census data by requiring states to redistrict within the first year of receiving the data instead of the present and more arbitrary rule of linking the standard to the last time the state redistricted. If that were the standard, cases like *NAACP v. Barbour* would never arise because the Mississippi legislature could not simply refuse to redistrict, as it did in 2011; otherwise a federal court would draw the district boundaries itself or require new elections.

Several state constitutions, like that of Mississippi, allow the legislature years to redistrict following the federal census.[141] If states were bound to redistrict as quickly as practicable after receiving the census data, it would reduce greatly the occurrence of electing officeholders according to eleven or twelve-year-old data as exemplified in *Fairley v. Forrest County*, *French v. Boner*, *Ramos v. Illinois*, and *NAACP v. Barbour*. Further, a legislature's voluntarily choosing not to redistrict in the first year, given that states have the technological ability to do so in an expeditious manner, does not seem to comport with the Court's practicability standard pronounced in *Reynolds*.

A second option would be for the states to develop a redistricting standard somewhere between five and ten years. Such action is certainly not without historical precedence. It was not uncommon at the time *Reynolds* was decided for states to redistrict more frequently than once every ten years.[142] And, as

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[141] MISS. CONST. art. 13, § 254. Maine allows its legislature three years to redistrict. ME. CONST. of 1968, art. IV, pt. 1, § 2.

[142] THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 58-62 (2010). Arizona, Colorado, Indiana, Kansas, and Ohio all had redistricting laws which required

evidenced by legislation in the wake of *LULAC*, many states have already begun to do so for congressional districts. In 1973, Hawaii required state legislative redistricting every eight years.[143] However, such redistricting is only useful in promoting equality between districts if the mid-decade census data is used or if the state supplements the decennial census data with its own state census.

CONCLUSION

In the years since *Reynolds v. Sims* was decided, increases in technology, communications, federal data collection, the mobility of citizens, and the number of states redistricting mid-decade has produced a need for the Supreme Court to revisit, for the first time since 1964, the question of how frequently a state should redistrict its congressional and legislative districts. Although a ten-year minimum made sense in 1964, developments in these areas, upon which the Court originally relied when addressing issues of population equality, make such a standard antiquated and in need of revision. As states begin to redistrict on an almost unpredictable basis to solidify political power since *LULAC v. Perry*, a newly imposed five-year standard with clear prohibitions on annual or biennial redistricting will maintain stability in the political process while realizing more fully the promise of one person, one vote.

Grant C. Mullins[*]

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redistricting more frequently than once per decade and Vermont and Minnesota gave precedence to their respective state censuses over the federal decennial census. *Id.*

[143] Levitt & McDonald, *supra* note 21, at 1254 n.30.

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BOOK NOTE

GORDON MARTIN'S *COUNT THEM ONE BY ONE*—THE HARD-FOUGHT STRUGGLE IN PURSUIT OF LIBERTY AND JUSTICE FOR ALL

COUNT THEM ONE BY ONE: BLACK MISSISSIPPIANS FIGHTING FOR THE RIGHT TO VOTE. By Gordon A. Martin, Jr. Jackson, Miss.: University Press of Mississippi. 2010. Pp. xii, 272; 14 p. of plates: ill. $40.00 (cloth).

INTRODUCTION

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.[1]

The text of the Fifteenth Amendment seems simple enough: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[2] But in the 1960s in southern Mississippi, a black man holding a graduate degree from New York's Columbia University was still unqualified to vote—even a black man who had previously enrolled in a course

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[1] McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (discussing disenfranchisement for false pretenses under § 241 of the Mississippi Constitution, which denies the right to vote for certain enumerated crimes); *see also* GORDON A. MARTIN, JR., COUNT THEM ONE BY ONE: BLACK MISSISSIPPIANS FIGHTING FOR THE RIGHT TO VOTE 228 (2010).

[2] U.S. CONST. amend. XV, § 1.

with the son of then-President Dwight D. Eisenhower.[3] In light of attempts by the state to conceal this discrimination under such guises as poll taxes and literacy tests, it was apparent and astonishing how much effort the Mississippi power structure exerted to suggest that the disenfranchisement of black voters was *not on account of* their race or skin color. *Count Them One by One: Black Mississippians Fighting for the Right to Vote*, by the Honorable Gordon A. Martin, Jr.,[4] details one battle with Forrest County Registrar Theron C. Lynd over black voter registration in Mississippi in the 1960s, and the heroic black witnesses involved who opened the door for subsequent civil rights legislation.[5]

The functional ability to exercise the right to vote—to make one's voice heard—is fundamental to the concept of a representative democracy.[6] But, even in the wake of *Brown v.*

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[3] MARTIN, *supra* note 1, at 173. Well before Judge Martin's experience in Mississippi, commentators recognized that Mississippi had employed tactics to avoid the proscriptions in the Fifteenth Amendment while at the same time suppressing the black vote. *See* William Alexander Mabry, *Disfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318, 332–33 (1938) ("A survey of the Mississippi constitution of 1890 reveals no direct disfranchisement of the Negro. The Fifteenth Amendment precluded any open discrimination against the blacks as a race. Yet one can scarcely read the debates of the convention and the press discussions without concluding that the intention of those in authority was to accomplish by indirect means what the Federal Constitution forbade doing directly. . . . [R]egistration officials were given wide discretionary powers in determining one's ability to read or understand a section of the constitution. Here was an opportunity for almost unlimited partiality . . . ."); *see also* United States v. Mississippi, 229 F. Supp. 925, 985–87 (1964) (three judge panel) (Brown, J., dissenting) (summarizing what transpired at the constitutional convention for the 1890 constitution); Barry E. Hawk & John J. Kirby, Jr., Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051, 1079 n.88 (1965).

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[5] *See generally* United States v. Lynd, 349 F.2d 790 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Lynd, 334 F.2d 13 (5th Cir. 1964); United States v. Lynd, 321 F.2d 26 (5th Cir. 1963); United States v. Lynd, 301 F.2d 818 (5th Cir. 1962). While the Lynd saga encompassed a records request under the Civil Rights Act of 1957, a preliminary injunction hearing, an appeal to the Fifth Circuit, a contempt hearing, and finally a trial on the merits, the preliminary injunction hearing and subsequent appeal to the Fifth Circuit represent the bulk of Judge Martin's story. *See Lynd*, 301 F.2d 818.

[6] *See* Bartlett v. Strickland, 556 U.S. 1, 10 (2009) (plurality) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our

Board of Education,[7] there was a great disparity in our nation, particularly in the South, between the law as decreed by the Supreme Court and the reality for black Americans, in terms of rights and remedies available.[8] In fact, failure has marred much of the Fifteenth Amendment's history; the laws enforcing it suffered from either repeal or inherent shortcomings, which placed the burdens of litigation on the Department of Justice and disenfranchised voters.[9]

By 1965, it was utterly undeniable that, despite the passage of the Fifteenth Amendment nearly a century earlier, the right to vote remained illusory for many American citizens.[10] With respect specifically to *United States v. Lynd*, the Commission on Civil Rights recognized that "[d]espite 2 years of intensive litigation and great efforts by the Department, fewer than 1 percent of the voting-age Negroes in Forrest County [were] registered."[11] The disappointing figures required a realization that "case-by-case proceedings, helpful as they ha[d] been in isolated localities, ha[d] not provided a prompt or adequate remedy for widespread discriminatory denials of the right to vote."[12] In an effort to make

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citizens: the right to vote."); United States v. Atkins, 323 F.2d 733, 743 (5th Cir. 1963) ("The right to vote is one of the most important and powerful privileges which our democratic form of government has to offer.").

[7] 347 U.S. 383 (1954).

[8] Shortly after the Court decided *Brown v. Board*, Mississippi's Governor invited numerous black leaders to the state capital to request that they "accept voluntary segregation." MARTIN, *supra* note 1, at 89. They unequivocally rejected the proposal. *Id.* at 89–90.

[9] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508–09 (2009).

[10] *See Nw. Austin*, 129 S. Ct. at 2508–09 (noting that the first century of enforcement of the Fifteenth Amendment "can only be regarded as a failure," and that the civil rights legislation during the 1950s and 1960s was insufficient to remedy the problem). Discussing the legislative history of the Voting Rights Act of 1965, the Supreme Court has noted that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[11] UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS '63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, at 20 (describing the unsatisfactory outcome of the *Lynd* case as one of the more successful Mississippi examples of civil rights litigation in the 1963 report).

[12] *Id.* at 13. A broader view on the litigation in this era leads to even more disappointing conclusions: "In eight years of litigation after governmental suits in 46 counties, only 37,146 Negroes had been registered in those counties out of 548,358

this right a reality, Congress enacted the Voting Rights Act of 1965.[13]

The Voting Rights Act was but one civil-rights-protecting law in a chain of many.[14] It generally followed the series begun by the 1957 Civil Rights Act, which established the Civil Rights Division of the Justice Department. The complaints of black plaintiffs in the private lawsuit *Peay v. Cox*, also originating in Forrest County, bolstered legislative support for the 1957 Act.[15] Just as the support of the *Peay* plaintiffs aided the passage of the 1957 Civil Rights Act, the efforts of the DOJ civil rights attorneys, along with the witnesses in early voter registration cases such as *Lynd*, helped pave the road to the VRA.[16] Lawmakers designed the Voting Rights Act to vest traditionally disparaged minorities with the dignity deserving of an American citizen: a voice in their government through the right to vote. The accomplishments of the Act are difficult to overstate.[17]

Judge Martin's account stands as a rebuttal to whatever accusations there were of insufficient need at the time of the

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voting age Negroes who resided in them." Hawk & Kirby, *supra* note 3, at 1195–96 (citing *Hearings on S. 1564 Before Senate Committee on the Judiciary*, 89th Cong., 1175–445 (1965)).

[13] Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971–1973p (2006)); *see Katzenbach*, 383 U.S. at 315–17 (noting that the Voting Rights Act of 1965 was a dramatic shift from the earlier civil rights legislation as it placed the impetus not on the victim—disenfranchised black citizens—but on the governmental bodies responsible for the disenfranchisement).

[14] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883); Civil Rights (Ku Klux) Act of 1871, ch. 22, 17 Stat. 13; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (second Enforcement Act, amending the Force Act of 1870); Force Act of 1870, ch. 114, 16 Stat. 140 (first Enforcement Act); Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* Michael A. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (discussing early civil rights legislation).

[15] *See* MARTIN, *supra* note 1, at 5.

[16] *See supra* note 5.

[17] Additionally, the utility in enshrining these stories is difficult to overstate. As Professor Brian Landsberg recognized: "[W]e are in . . . a struggle for . . . memory. If David Irving can deny the Holocaust, so will some future historians deny or try to explain away the United States' record of racial discrimination." Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877, 883 (2003) (footnote omitted).

passage of the Voting Rights Act of 1965.[18] The need for the new law was attributable to both deficiencies in the prior civil rights acts as well as the extent to which states subverted the rights of blacks in the South. In his book, Martin illustrates through factual accounts how these well-regarded individuals he encountered deserved to vote more than many of the registered white Mississippians. Additionally, he describes the hard-fought battle against the guardians of the status quo, which included employers, educators, politicians, and judges.[19] The heroes of Judge Martin's story were not merely those with high moral character, but those who were dedicated to their family, faith, community, and their country. The later of these is perhaps the most inspiring: fidelity to a nation that had so long been misused as an apparatus for oppression.

I. ONE MAN STANDING IN THE WAY: *UNITED STATES V. LYND*

The rhythm of *Count Them One by One* eloquently transports the reader to this historical era. First, Judge Martin recreates the tension of Mississippi in the 1960s by contextualizing the story of the *Lynd* trial in the greater context of the civil rights movement and politics in America at the time. Next, Judge Martin tells his story and the stories of the witnesses bold enough to testify to assert their rights as American citizens to vote. Finally, Judge Martin brings closure to the experience for both himself and the reader. This closure, however, is bittersweet because it forces the reader to face the reality that despite some gains, the United States is still plagued with inequality.

At the time of the *Lynd* trial, Americans were just beginning to witness the passage of civil rights legislation; the Civil Rights

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[18] *See* Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade, 1962–1965*, 57 S.C. L. REV. 889, 917 (2006) ("Unlike the Civil Rights Act of 1964, which had met with such fierce opposition from southerners in Congress that deliberations dragged on for nearly a year before the bill passed, the . . . [Voting Rights Act of 1965] encountered mild resistance." (citing STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 320–21 (1999))).

[19] Former First Assistant Attorney in the Civil Rights Division John Doar recalled finding in Alabama, Louisiana, and Mississippi "a complex legal and social network designed to protect and preserve the caste system." John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Act of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 4 (1997).

Acts of 1957 and 1960 were the first of their kind since the passage of the Fifteenth Amendment and the Civil Rights Act of 1880. This trial illustrated the ossifying resistance that the South mounted against the civil rights movement, and the inadequacies of the early civil rights legislation in dealing with such defiance. This case, challenging as it was, served as a record for the more comprehensive legislation to remedy the disenfranchisement of the southern states. The degree of state involvement in disenfranchising black voters was vast, and included abuses of discretion by local registrars, legal representation for local officials willing to resist the federal government, and systemically unfair barriers to voting registration.[20]

Judge Martin's title frames the issue: this was a fight, legislatively as well as judicially. Prior to the 1959 ascendancy of one of Martin's primary protagonists, Registrar Theron C. Lynd, the black residents of Forrest County suffered the rejections of Registrar Luther Cox.[21] The struggle with Cox resulted in a lawsuit, *Peay v. Cox*, which the court ultimately dismissed.[22] But, the affidavits and experiences of these *Peay* plaintiffs influenced the passage of the Civil Rights Act of 1957 and the creation of the Civil Rights Division that would eventually employ Martin as a staff attorney.[23]

This was a fledgling division in the Department of Justice, however, and early on it floundered against the power structure of

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[20] *See* MARTIN, *supra* note 1, at 59 ("'I, along with the entire staff of this office [of the attorney general of Mississippi], stand ready to render to you any assistance and service that this office can render.'" (quoting Attorney General's Papers, Box 17480, Folder 15, Mississippi State Archives)); *see also supra* note 3.

[21] *See* MARTIN, *supra* note 1, at 3–4. Luther Cox, who was of no relation to the subsequently appointed federal judge Harold Cox, was notorious for frustrating would-be black voters with questions that could elicit conflicting views among legal scholars and unanswerable riddles, such as "[h]ow many bubbles are in a bar of soap?" *Id.* at 3. Lynd was largely irrelevant on a personal basis, given the fact that the other candidates he faced in the registrar election expressly proclaimed they would suppress the black vote as well. *Id.* at 37–38.

[22] Peay v. Cox, 190 F.2d 123 (5th Cir. 1951).

[23] MARTIN, *supra* note 1, at 5; *see also id.* at 23–25 (detailing the political negotiations that transpired in the lead-up to passage of the 1957 Act). The Civil Rights Division, created by the 1957 Act, essentially built upon the preexisting Civil Rights Section that had existed in the Department of Justice hierarchy under the Criminal Division. *Id.* at 20.

Mississippi.[24] Despite the optimism that might have followed passage of the 1957 Act, Martin recounts that its predecessor, the Civil Rights Section in the Criminal Division, had been systemically inadequate and that it was "shocking to observe the paper shuffling that went on as a substitute for law enforcement."[25] Once created, the Civil Rights Division suffered from an absence of leadership and enthusiasm. This all changed with the arrival of Attorney General Robert Kennedy. Kennedy initiated a new era of leadership that transformed the division into a decisive entity, and it was the leaders he appointed who recruited Judge Martin for the looming civil rights battles.[26]

The division itself was not alone in its youth, and its leadership no doubt found comfort in the energy and optimism of the young lawyers it recruited, such as Judge Martin.[27] Tracing back as early as his serendipitous attendance at an elite preparatory school, Martin had long sought to address the Southern disenfranchisement he saw as "the single greatest social wrong in [our] country."[28] Although his career defining and history-making journey began when he himself had little experience, Judge Martin was nonetheless an integral part of the division that John Doar later described as driven by a philosophy of hope: "This kind of hope is . . . not a willingness to invest in an enterprise that is obviously heralded for early success, but rather the ability to work hard for something because it makes sense, not because it stands a chance to succeed."[29]

The political dealings that resulted in the division's creation and much of the early civil rights legislation are not lost in the story. In fact, in many ways the politics of the era played a pivotal role. On the one hand, Eisenhower and Kennedy were able to successfully appoint civil rights protecting judges to the Second

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[24] *See* Doar, *supra* note 19, at 1; Landsberg, *supra* note 17, at 897–98.

[25] MARTIN, *supra* note 1, at 20.

[26] *See id.* at 33–35; *see also* Doar, *supra* note 19, at 2–4.

[27] The stamina and flexibility of these young attorneys undoubtedly enabled them to complete the up to three-week excursions into the southern states to develop the cases for trial. *See* MARTIN, *supra* note 1, at 41.

[28] *Id.* at 43.

[29] *See* Doar, *supra* note 19, at 5 (attributing the concept of this philosophy to President Vaclav Havel of Czechoslovakia). Judge Martin graduated from law school barely two years prior to joining the division. MARTIN, *supra* note 1, at 43.

and Fifth Circuits. On the other hand, however, they left Mississippi and the division to deal with Judge Harold C. Cox of the Southern District of Mississippi.[30] Alarmingly, Judge Martin even details a meeting between Attorney General Kennedy and Harold Cox prior to his judicial appointment, at which time Kennedy directly challenged Cox as to whether he would adhere to the law.[31] Thus, in exchange for the early legislation and several beneficial appointments, the civil rights movement faced a judge intent on serving as a structural impediment to the work of the division.[32]

Judge Martin's familiarity with the *Lynd* case is unsurpassed even by the court record. His recitation effectively explicates portions of the transcripts, internal discussions within the division, mental thoughts and impressions of a division attorney, and even the personal notes of opposing counsel that have since been consolidated in the M.M. Roberts Collection at the University of Southern Mississippi. Additionally, as a staff attorney for the division, his rapport with the witnesses merged into friendship, which only further enhanced his portrayal of the *Lynd* case. As a homage to their heroic and courageous efforts—and no doubt to their relationship as well—Martin voluminously shares the unique stories of the *Lynd* witnesses, both prior to and following the life-changing trial.

In preparing this case for trial, the division attorneys faced what was later referred to as the "well-nigh impossible task of showing the true facts . . . that certain serious discriminations had taken place during the term of office of the defendant Lynd."[33] Martin and other division attorneys had assembled a collection of more than a dozen black witnesses, whom Forrest County's

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[30] For a discussion of the negotiations leading up to Kennedy's decision to appoint Cox, see MARTIN, *supra* note 1, at 53–58, 203–04. Had he failed to appoint Cox, chairman of the Senate Judiciary Committee, Mississippi's own James O. Eastland, would have refused to confirm Thurgood Marshall to the Second Circuit. *Id.* at 203–04.

[31] *Id.* at 53–54 ("I said that the great reservation that I had was whether he'd enforce the law and whether he'd live up to the Constitution . . . ." (quoting ROBERT F. KENNEDY, ROBERT KENNEDY, IN HIS OWN WORDS: THE UNPUBLISHED RECOLLECTIONS OF THE KENNEDY YEARS 109 (1988))).

[32] *See infra* notes 47–49 and accompanying text. For an early catalogue of Judge Cox's civil rights record, see Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 107 n.87 (1963) (citing cases).

[33] United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962).

registrar had rejected, to testify in their fledgling case.[34] Additionally, after a pre-trial strategy change, the witness list also included several white witnesses that Lynd registered despite lesser qualifications than the black witnesses or without the requirement of interpreting any section of the constitution.[35]

One would anticipate that witnesses holding undergraduate- and graduate-level degrees, among other well-educated individuals, clearly qualified to register to vote under practically *any* requirement. This was, however, Mississippi in the 1960s. Not only did a state actor deny them the right to vote, but mere presentation of the evidence of this discrimination was a challenge before the racially intolerant Judge Cox.[36] Furthermore, the state of Mississippi repeatedly buffeted the division attorneys by changing voting laws during this time, which "demonstrated a conscious policy of disfranchisement of Negroes, manifested by reactions to federal court decisions and congressional voting legislation."[37]

Mississippi had long since authorized three principal impediments to black would-be voters dating back to its last constitutional convention: a residency requirement, a poll tax, and a literacy test.[38] Alongside these *constitutional* impediments, black Mississippians also suffered under a grossly inadequate educational system including a lack of bussing, regularly un- and under-paid teachers, and public schooling that stopped at the

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[34] MARTIN, *supra* note 1, at 45–46.

[35] *Id.* at 45, 179–89.

[36] Judge Joseph C. Hutcheson, Jr. of the Fifth Circuit even openly acknowledged Judge Cox's seemingly disruptive agenda during oral arguments: "[Judge Cox] either had a lack of experience for an injunction, and didn't understand what it was, or he was just trying to prevent an appeal. Nobody ever tried a temporary injunction like that in the history of the world, at least in my world." MARTIN, *supra* note 1, at 204 (citation omitted) (internal quotation marks omitted).

[37] Hawk & Kirby, *supra* note 3, at 1082 (discussing numerous new laws, including an authorization to destroy voting records in direct conflict with the requirements of the Civil Rights Act of 1960).

[38] *Id.* at 1079–80 (citing MISS. CONST. art. XII, § 241 (amended 1968) (requiring two years of residency); art. XII, § 243 (repealed 1975) (annual poll tax); art. XII, § 244 (repealed 1975) (literacy test)); *see also* MISS. CONST. art. XII, § 241-A (repealed 1965) (requiring good moral character). Following the efforts of the *Peay* plaintiffs in *Peay v. Cox*, 190 F.2d 123 (5th Cir. 1951), Mississippi enhanced § 144 to require interpretation regardless of literacy. Hawk & Kirby, *supra* note 3, at 1081.

eighth grade for much of the black voting-age population.[39] The institutional and legal barriers for black Mississippians greatly perpetuated disenfranchisement because registrars almost universally registered whites without requiring them to interpret a section of the constitution, whereas they assigned blacks, when allowed to register at all, lengthier and more complex sections.[40] Judge Brown of the Fifth Circuit even noted that "[Lynd] rejected many Negroes who gave answers worthy of a law review editor on ex post facto laws."[41]

Other technical challenges in presenting this case were legion. The division attorneys prepared the case away from their homes and in a culture unlike their own: "the back roads; the operations of county registrar's offices; the states' registration laws; 100 years of history; the identity of the local leaders; the way the court's family in each judicial district functioned—the clerk, the judge's secretary, the marshals, the U.S. Attorney, the court reporter—you name it."[42] Aside from institutional complexities, division attorneys and even judges[43] were well aware that

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[39] *See* MARTIN, *supra* note 1, at 88–89, 169. Furthermore, civic *leaders* in the state, such as the defense attorney in the *Lynd* case, M.M. Roberts, also positioned themselves when possible into positions to perpetuate discrimination. For example, Roberts utilized his connections with then-Governor Ross Barnett to secure a position on the Board of Trustee of the Institutions of Higher Learning where he pressured university administrators and faculty who challenged the white status quo. *Id.* at 83–84.

[40] *See* United States v. Lynd, 301 F.2d 818, 822 n.1 (5th Cir. 1962) ("[B]y any objective standard those [sections] supplied to the Negro applicants were longer, more complicated, and more difficult. Ten white witnesses testified that they were not required to write or interpret any provision of the Mississippi constitution."). Martin cataloged many of the sections that Cox and Lynd had required the black witnesses to interpret. MARTIN, *supra* note 1, at 207 (discussing black witnesses and the interpretation of MISS. CONST. art. III, § 13); *id.* at 9 (art. III, § 14); *id.* at 141 (art. IV, § 72); *id.* at 208 (art. IV, § 112); *id.* at 51 (art. V, § 118); *id.* at 107, 140 (art. V, § 121); *id.* at 143, 163 (art. VI, § 165); *id.* at 71–72, 205 (art. VII, § 178); *id.* at 147 (art. VIII, § 211); *id.* at 113 (art. XI, § 233); *id.* at 106, 158 (art. XV, § 273). The sections the registrar required the white witnesses to interpret, when required to at all, were comparatively simpler. *Id.* at 45, 107 (discussing white witnesses and the interpretation of MISS. CONST. art. III, § 30); *id.* at 181 (art. V, § 116); *id.* at 51 (art. V, § 118); *id.* at 51 (art. V, § 128); *id.* at 188 (art. V, § 143); *id.* at 181 (art. X, § 226); *id.* at 189 (art. XIV, § 258).

[41] United States v. Lynd, 349 F.2d 790, 792 n.4 (5th Cir. 1965).

[42] Doar, *supra* note 19, at 4.

[43] MARTIN, *supra* note 1, at 209 (quoting Judge John Brown of the United States Court of Appeals for the Fifth Circuit).

Southern discrimination was not limited to skin color.[44] These outsiders represented a concerted threat powered by the federal government that sought to uproot the unlawful restriction of black voting and the Southern caste system.[45] As a Boston native, a Catholic, and a diligent Civil Rights Division attorney, Judge Martin was not unreasonable in his apprehension since, as he recalls, "any white Mississippian not a Baptist had cause for concern."[46]

What should have been a relatively simple case—testimony as to what did or did not occur upon attempting to register—was complicated inexorably by the procedural morass Judge Cox allowed to occur. Hardly a year into his appointment, Cox was "duly reversed and lectured"[47] by the Fifth Circuit for frustrating the attorney general's records requests made pursuant to the 1960 Act.[48] Furthermore, at the outset of the division's preliminary injunction case, Judge Cox limited testimony to witnesses who had been turned away while Lynd was in office; an approximately two-year window of time.[49]

Judge Martin's description of the trial proceedings exposes it for the farce that it was. For example, Cox aided the defense in questioning—and similarly the witnesses in testifying—when he interjected: "What you are saying is that the criteria you use for

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[44] *See id.* at 39–40 (contextualizing his own arrival in the South as just two years prior to the murder of Freedom Summer workers James Chaney, Andrew Goodman, and Michael Schwerner).

[45] *See id.* at 55–56 n.9 (citing HORTENSE POWDERMAKER, AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH app. A (Russell & Russell 1969) (1939)) (discussing a landmark study of the complex social caste system prevalent in many southern areas, specifically in Judge Cox's home county).

[46] MARTIN, *supra* note 1, at 49.

[47] *Id.* at 59.

[48] *See* Civil Rights Act of 1960, Pub. L. No. 86–449, §§ 301–306, 74 Stat. 86, 88–89 (codified at 42 U.S.C. §§ 1974-1974e (2006)); Kennedy v. Lynd, 306 F.2d 222, 227–29 (5th Cir. 1962) (requiring production of election records requested by the attorney general). In what appeared almost retaliatory, Cox dismissed the collateral and legitimate records request from the attorney general on the basis that the division had subsequently sought to enjoin Lynd for his discrimination. *See* MARTIN, *supra* note 1, at 46, 58–59.

[49] United States v. Lynd, 301 F.2d 818, 820 (5th Cir. 1962) ("[T]he trial court required that all but 40 of [the 63 witnesses] be eliminated because the incidents as to which they were identified occurred prior to this date."); MARTIN, *supra* note 1, at 46, 48–49.

both white and colored are alike?"[50] Additionally, the equitable notion of preliminary relief was eviscerated from the hearing when Cox allowed the defense to cross-examine the division's witnesses, but postpone their own side of the case for thirty days to *prepare*; effectively lodging a month-long wedge into the government's case.[51] Cox's ultimate denial of any resolution at the end of the hearing prompted an immediate appeal by the division, and a surprisingly swift and involved intervention from the Fifth Circuit that served as the initial bookend in Judge Martin's experience in Forrest County.[52]

II. THE BATTLE IS FAR FROM OVER

Years after his experience as a young Civil Rights Division attorney, Judge Martin returned to Mississippi to reconnect with the people and events that unquestionably shaped the foundation for his career in public service.[53] It is from his memories, interviews, and diligent research that this memorial of normal men and women acting heroically emerged. Many of the witnesses went on to live fulfilling lives in a gradually improving Southern culture. Tragedy, both natural and unnatural, cut other lives short. Vernon Dahmer, whom Klan conspirators murdered for his civil rights efforts, was only recently vindicated by the 1998 conviction of Sam H. Bowers.[54] As Judge Martin acknowledges, however, the struggle for equality is not over.[55]

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[50] MARTIN, *supra* note 1, at 192 (interjecting into the division's direct examination of registrar Lynd).

[51] *Id.* at 198, 204; *see also supra* note 37. Cox also restrained the division from leading its own hostile, white witnesses while conversely permitting the defendants to lead those witnesses that were clearly friendly to them. MARTIN, *supra* note 1, at 182–84.

[52] The Fifth Circuit took the unusual step of issuing an order directly from the bench instead of remanding, certainly to thwart further procedural delays. MARTIN, *supra* note 1, at 206. This choice, however, resulted in the Fifth Circuit panel traveling to Hattiesburg shortly after issuing its order to conduct a contempt hearing. *Id.* at 208.

[53] *See supra* note 4.

[54] Rick Bragg, *Jurors Convict Former Wizard in Klan Murder*, N.Y. TIMES, Aug. 21, 1998, at A1; *see also* MARTIN, *supra* note 1, at 220–21.

[55] MARTIN, *supra* note 1, at 233. In fact, the continued existence of some provisions of the Voting Rights Act of 1965, which were originally set to expire after five years, depend upon periodic reenactment by Congress. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (extending provisions by twenty-five years and

The facts illustrate a sad reality of stagnation in the years after the civil rights movement.[56] For example, in the South today, blacks suffer under many more impediments than whites due to "institutional racism."[57] The southern states also disproportionately imprison far more blacks than whites.[58] Because southern states execute more of their prisoners than their northern counterparts, blacks in the South are more likely to face the death penalty.[59] Additionally, the death penalty is most frequently administered in black-assailant white-victim scenarios.[60] Aside from physical incarceration, blacks in the South are also more likely to live below the poverty line than whites, imprisoning them economically.[61]

Despite the persistent problems in eliminating inequality, states continue to mount legal challenges against civil rights era

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subsequently renamed the "Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006," Act of July 1, 2008, Pub. L. No. 110-258, 122 Stat. 2428); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (extending twenty-five years); Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (extending seven years); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (extending five years). Furthermore, the growing legion of challenges to the constitutionality of many of the more dramatic provisions of the act suggests it may not endure in perpetuity. *See infra* notes 62–65 and accompanying text.

[56] For a recent commentary on this topic, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[57] Scholars have described this type of racism thusly: "Though less open and blatant than in the past, racism is said to have subtly embedded itself in institutions that continue to disadvantage blacks." JOHN ARTHUR, RACE, EQUALITY, AND THE BURDENS OF HISTORY 161 (2007) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987)). *But see* DERRICK A. BELL JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (arguing factors other than race contribute to poverty rates).

[58] DAVID BROWN & CLIVE WEBB, RACE IN THE AMERICAN SOUTH: FROM SLAVERY TO CIVIL RIGHTS 325 (2007); *see also* Chauncee D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1016–20 (2009) (evaluating minority imprisonment rates).

[59] BROWN & WEBB, *supra* note 58, at 325 (citation omitted) (citing *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Apr. 18, 2012)).

[60] *Id.*

[61] *Id.* at 326; TIMOTHY J. MINCHIN & JOHN A. SALMOND, AFTER THE DREAM: BLACK AND WHITE SOUTHERNERS SINCE 1965, at 290–94 (2011) (discussing economic conditions in the South).

legislation as the Supreme Court in recent years has increasingly signaled its suspicion of the constitutionality of some provisions of the Voting Rights Act.[62] Several states, including Alabama, Arizona, Florida, and North Carolina, are presently challenging the constitutionality of provisions of the Voting Rights Act.[63] Furthermore, Mississippi has passed an amendment to its constitution and enacting legislation requiring voters to present identification prior to casting their votes.[64] The attorney general recently struck down a similar voter identification law in South Carolina, creating speculation as to the viability of Mississippi's election law change.[65]

The route to recovery itself is frequently unclear. In Noxubee County, Mississippi, the Department of Justice ironically used the Voting Rights Act to dismantle black dilution of white votes.[66] Although perhaps an effort tinted with good intentions, "what [the defendants] view[ed] as an honorable goal of electing black

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[62] *See* Perry v. Perez, 132 S. Ct. 934, 942 (2012) ("This Court recently noted the 'serious constitutional questions' raised by § 5's intrusion on state sovereignty." (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009))); Robert Barnes, *Voting Rights Provision in Peril*, WASH. POST, Feb. 10, 2012, at A3 [hereinafter Barnes, *Voting Rights*] (discussing the rise of challenges to the preclearance provisions of Voting Rights Act of 1965); Robert Barnes, *Justices Toss Texas's Minority-Backed Electoral Maps*, WASH. POST, Jan. 21, 2012, at A4.

[63] *See* Order, Shelby Cnty., Ala. v. Holder, No. 11–5256 (D.C. Cir. Oct. 6, 2011), (Doc. No. 1333740) (granting unopposed motion for expedited appeal); *see also* Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011); LaRoque v. Holder, No. 10–0562, 2011 WL 6413850 (D.D.C. Dec. 11, 2011) (pending before the D.C. Circuit Court); Arizona v. Holder, 1:11-cv-01559 (D.D.C.) (pending before the D.C. District Court); Florida v. United States, 1:11-cv-01428 (D.D.C.) (pending before the D.C. District Court). Additionally, Georgia previously challenged the constitutionality of the Voting Rights Act in the alternative to its request for preclearance, but the court dismissed the case when preclearance was granted. *See* Order, Georgia v. Holder, No. 11–1788 (D.D.C Jan. 3, 2012).

[64] *See* H.R. 921, 2012 Leg., Reg. Sess. (Miss. 2012); Jessica Bakeman & Deborah Barfield Berry, *Voter ID Still Faces Hurdle*, CLARION-LEDGER, Nov. 11, 2011, at A1; *see also* JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE: THE TRUTH ABOUT VOTER FRAUD 6 (2007), *available at* http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("The most common example of the harm wrought by imprecise and inflated claims of "voter fraud" is the call for in-person photo identification requirements.").

[65] *See* Warren Richey, *In Voter ID Case, South Carolina Fights Back Against Obama Administration*, CHRISTIAN SCI. MONITOR, Feb. 8, 2012, http://www.csmonitor.com/USA/Justice/2012/0208/In-voter-ID-case-South-Carolina-fights-back-against-Obama-administration; *see also* Complaint, South Carolina v. United States, No. 1:12-cv-00203 (Feb. 07, 2012).

[66] United States v. Brown, 561 F.3d 420, 433–35 (5th Cir. 2009).

candidates," it was at its core nothing more than unlawful discrimination.[67] Further, partisan implications often cloud the civil rights discussion, a complication Judge Martin himself succumbs to when he suggests the election of Democrats is a necessary component to progress.[68] The trouble is that the Department of Justice's preclearance enforcement under the Voting Rights Act can easily appear to be motivated by political gamesmanship as opposed to laudable protection.[69] While this may be unavoidable or undesirable as a result of the congressional choice,[70] it nonetheless encourages criticism of the Voting Rights Act when a Democrat's attorney general refuses to pre-clear certain changes, an ambiguity unwelcome in the already challenging arena of racial dialogue.[71]

Undoubtedly, this is attributable to the absence for decades of a comprehensive civil rights education in Mississippi's public schools.[72] The prior "savior narrative" taught to students oversimplified the efforts during the civil rights movement and undermined the impetus for continued improvement.[73] There is hope for improvement, however, with the recent passage and

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[67] *Id.* at 435.

[68] MARTIN, *supra* note 1, at 233 (suggesting the future of racial progress in Mississippi involves electing Democrats, but failing to recognize the imprecision in such broad based political party stereotyping).

[69] Barnes, *Voting Rights*, *supra* note 62.

[70] *See generally* Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 513, 521 (2007) ("While it [is] hard to conclude that the Act was administered in a partisan way from 1970 through 1995, that explanation remains a possibility, especially after 2000."); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 677–79 (2002) (decrying the problems that would accompany the use of nonpartisan committees for redistricting); Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L & POL'Y REV. 324, 335–42 (2007) (attempting to define what should constitute a *partisan* enforcement decision).

[71] *See supra* note 65 and accompanying text. *But see supra* note 63 (noting the attorney general pre-cleared Georgia's changes).

[72] *See* Associated Press, *Civil Rights a Year-Round Lesson in Miss. Schools*, CLARION-LEDGER, Jan. 16, 2012, at A5.

[73] *See id.* ("It's important for students to learn more than the 'savior narrative' of 'Rosa (Parks) sat down, Martin stood up and now everyone is free' . . . . 'What we want to do is complicate that narrative and make it more historically accurate . . . .'" (quoting Susan Glisson, Director, William Winter Institute for Racial Reconciliation at the University of Mississippi)).

implementation of legislation requiring a civil rights curriculum.[74] Part of the stated intent of the civil rights education legislation is that "Mississippi's central role in the civil rights struggle needs to be formalized and taught as a beacon of hope for all of our citizens."[75] While the struggle for equality is not over, we appear to be moving in the right direction.

CONCLUSION

Legislative acts and judicial opinions affect our lives in sometimes radical ways, but these instruments rarely detail the full story. The instrumental characters, the context of their story, their lives; too often these elements are left unsung. Honorable Gordon A. Martin, Jr., tells these stories with both diligence and exhaustive attention to detail. In doing so, he dignifies the efforts of these witnesses, without whose testimony we might not have the Voting Rights Act of 1965. These men and women, just as their storyteller, bear witness to the marks of greatness that result from attempting, let alone completing, such a great moral and ethical conquest. Much is still unwell in our country, and in particular the southern region. But Judge Martin's story should stand as an example for us all: our society would benefit from more men like Martin, Vernon Dahmer, and the other *Lynd* witnesses who had the courage to stand for justice and live their lives fighting and dying for equality. If compassion were as plentiful as hate; if Americans had historically pursued freedom instead of oppression; if we all exhibited the courage of these attorneys and witnesses, then what type of world could we imagine for future generations? *Count Them One by One* challenges us all to ask these questions and, hopefully, seek the answers.

Andrew Scott Harris[*]

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[74] *See* Miss. Laws 2006, Reg. Sess., ch. 436. S.B. 2718, § 2 (codified at MISS. CODE ANN. §§ 37-13-191 to -195 (2007)); *see also* Chauncey Spears, *Social Studies Framework*, MISS. DEPT. OF EDUC., http://www.mde.k12.ms.us/ACAD/ID/Curriculum/ss/index.html (last visited Apr. 18, 2012).

[75] MISS. CODE ANN. § 37-13-191 (2007).

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